

**U.S. Bankruptcy Court
Eastern District of Michigan (Detroit)
Bankruptcy Petition #: 13-53846-swr**

Date filed: 07/18/2013

Assigned to: Judge Steven W. Rhodes
Chapter 9
Voluntary
No asset

Debtor In Possession
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Detroit, MI 48226
WAYNE-MI
Tax ID / EIN: 38-6004606

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Filing Date	#		Docket Text
10/17/2013		<u>1242</u>	Declaration in Support of Pre-Trial Brief in Opposition to Eligibility Filed by Retiree Committee Official Committee of Retirees. (Attachments: # <u>1</u> Exhibit A # <u>2</u> Exhibit B # <u>3</u> Exhibit C # <u>4</u> Exhibit D # <u>5</u> Exhibit E # <u>6</u> Exhibit F # <u>7</u> Exhibit G # <u>8</u> Exhibit H) (Montgomery, Claude) (Entered: 10/17/2013)
10/17/2013		<u>1244</u>	Brief Pre-Hearing Brief of the Detroit Retirement Systems in Support of Their Eligibility Objections Sepcifically Pursuant to Sections 109(c)(5) and 921(c) of the Bankruptcy Code Filed by Creditors General Retirement System of the City of Detroit, Police and Fire Retirement System of the City of Detroit. (Gordon, Robert) (Entered: 10/17/2013)
10/30/2013		<u>1467</u>	Supplemental Brief Regarding Eligibility Filed by Creditor Michigan Council 25 Of The American Federation of State, County &Municipal Employees, AFL-CIO and Sub-Chapter 98, City of Detroit Retirees (RE: related document(s) <u>1217</u> Order (Generic)). (Levine, Sharon) (Entered: 10/30/2013)
10/30/2013		<u>1469</u>	Supplemental Objection to Eligibility to Chapter 9 Petition (Supplemental Brief of International Union, UAW in Support of Their Amended Objection [DE 1170]) Filed by Creditor International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (Ceccotti, Babette) (Entered: 10/30/2013)
10/30/2013		<u>1472</u>	Brief Supplemental Brief in Support of Objection of the Detroit Retirement Systems to the Eligibility of the City of Detroit,

			<i>Michigan, to Be a Debtor Under Chapter 9 of the Bankruptcy Code</i> Filed by Creditors General Retirement System of the City of Detroit, Police and Fire Retirement System of the City of Detroit (RE: related document(s) <u>519</u> Objection to Eligibility to Chapter 9 Petition, <u>1166</u> Reply – motions). (Gordon, Robert) (Entered: 10/30/2013)
10/30/2013		<u>1473</u>	Amended Objection to Eligibility to Chapter 9 Petition (<i>Supplemental Brief in Support of</i> Filed by Creditors Detroit Fire Fighters Association, I.A.F.F. Local 344, Detroit Police Command Officers Association, Detroit Police Lieutenants and Sergeants Association, Detroit Police Officers Association (Patek, Barbara) (Entered: 10/30/2013)
11/06/2013		<u>1556</u>	Brief / <i>City of Detroit's Supplemental Brief in Support of Entry of an Order for Relief</i> Filed by Debtor In Possession City of Detroit, Michigan. (Bennett, Bruce) (Entered: 11/06/2013)

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

	x	
	:	
In re	:	
	:	Chapter 9
	:	
City of Detroit, Michigan,	:	Case No. 13-53846
	:	
Debtor.	:	Hon. Steven W. Rhodes
	:	
	x	

**DECLARATION OF CLAUDE D. MONTGOMERY, ESQ. IN SUPPORT OF THE
PRE-TRIAL BRIEF OF THE OFFICIAL COMMITTEE OF RETIREES
REGARDING THE CITY OF DETROIT'S ELIGIBILITY TO BE
A DEBTOR UNDER CHAPTER 9 OF THE BANKRUPTCY CODE**

I, Claude D. Montgomery, Esq., hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746 as follows:

1. I am a Partner at Dentons US LLP (“Dentons”) and am admitted to practice in the Courts of the State of Michigan.

2. Dentons represents the Official Committee of Retirees (the “Committee”). In an order entered on August 2, 2013, the Bankruptcy Court directed the appointment of the Committee in the bankruptcy proceeding, the members of which were appointed on August 22, 2013. (Dkt. 279).

3. On July 19, 2013, the Debtor filed a Motion of Debtor for Entry of an Order (A) Directing and Approving Form of Notice of Commencement of Case and Manner of Service and Publication of Notice and (B) Establishing a Deadline for Objections to Eligibility and a Schedule for Their Consideration (“Eligibility Motion”). (Dkt. 18).

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4. On August 2, 2013, the Bankruptcy Court entered an Order establishing Dates and Deadlines, including an October 17, 2013 deadline to file pre-trial briefs. (Dkt. 280).

5. On August 26, 2013, the Bankruptcy Court entered an Order setting forth a discovery schedule with respect to the Eligibility Motion and setting a trial on any objections to the City's eligibility for Chapter 9 relief (the "Eligibility Objections") for October 23, 2013. (Dkt. 296).

6. On September 10, 2013, the Committee filed an Objection to the Eligibility of the City to Be a Debtor under Chapter 9 of the Bankruptcy Code (the "Committee Eligibility Objection"). (Dkt. 805).

7. On September 12, 2013, the Bankruptcy Court entered an Order establishing hearing dates of October 15 and 16 for Eligibility Objections that raise only legal issues. (Dkt. 821).

8. On October 11, 2013, the Committee filed its Supplemental Objection to Eligibility of the City of Detroit, Michigan to Be a Debtor Under Chapter 9 of the Bankruptcy Code. (Dkt. 1174).

9. Pursuant to the Bankruptcy Court's order of August 2, 2013, the Committee is submitting its Pre-Trial Brief Regarding the City of Detroit's Eligibility to be a Debtor Under Chapter 9 of the Bankruptcy Code (the "Pre-Trial Brief") in order to summarize what it expects to show at the October 23, 2013 hearing concerning the eligibility of the City of Detroit to be a debtor.

10. Attached hereto as Exhibit A in support of the Pre-Trial Brief are true and correct copies of selected pages of the Transcripts for the deposition of Kevyn Orr, taken on September 16, 2013 and October 4, 2013, together with Exhibit 4 to the deposition.

11. Attached hereto as Exhibit B in support of the Pre-Trial Brief are true and correct copies of selected pages of the Transcript for the deposition of Gaurav Malhotra, taken on September 20, 2013.

12. Attached hereto as Exhibit C in support of the Pre-Trial Brief are true and correct copies of selected pages of the Transcript for the deposition of Richard Snyder, taken on October 9, 2013.

13. Attached hereto as Exhibit D in support of the Pre-Trial Brief are true and correct copies of selected pages of the Transcript for the deposition of Lamont Satchel, taken on September 19, 2013.

14. Attached hereto as Exhibit E in support of the Pre-Trial Brief are true and correct copies of selected pages of the Transcript for the deposition of David Bing, taken on October 14, 2013, together with Exhibit 5 to the deposition.

15. Attached hereto as Exhibit F in support of the Pre-Trial Brief are true and correct copies of selected pages of the Transcript for the deposition of Charles Moore, taken on September 18, 2013.

16. Attached hereto as Exhibit G in support of the Pre-Trial Brief are true and correct copies of selected pages of the Transcript for the deposition of Glenn Bowen, taken on September 24, 2013.

17. Attached hereto as Exhibit H in support of the Pre-Trial Brief are true and correct copies of selected pages of the Transcript for the deposition of Andrew Dillon, taken on October 10, 2013.

I, the undersigned, declare under penalty of perjury that the foregoing is true and correct.

Dated: October 17, 2013
New York, New York

/s/ Claude D. Montgomery

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EXHIBIT A

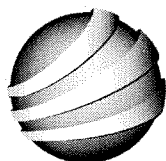
TO THE DECLARATION OF CLAUDE D. MONTGOMERY, ESQ.

In the Matter Of:
CITY OF DETROIT, MICHIGAN

Case NO. 13-53846

KEVYN ORR

September 16, 2013



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1 A. Yes.

2 Q. -- you're talking again -- at this point in time had
3 you decided whether to accept the Emergency Manager
4 job? This is later in the afternoon on January 31.

5 A. No, I didn't. I -- no, there was no time in the
6 initial two days that this came up that I decided to
7 accept the Emergency Manager job.

8 Q. Okay. And in this email you're giving some thoughts
9 on some of the issues that pertain to that; aren't
10 you?

11 A. Yes.

12 Q. And in particular you start talking about the
13 legislation that pertains to the EM position. You
14 said you went back and reviewed various laws; do you
15 see that?

16 A. Yes.

17 Q. And you talked about some laws in DC control board and
18 then you go on in the last sentence -- or I'm sorry,
19 the second to the last sentence to write, and I quote,
20 "By contrast Michigan's new EM law is a clear
21 end-around the prior initiative that was rejected by
22 the voters in November."

23 You wrote that?

24 A. Yes.

25 Q. And by the new EM law, you were referring to PA 436?



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1 Q. And you go on then in the -- and you were -- I guess
2 -- were you aware that for either the case of the
3 Chapter 9 being filed with the governor's approval
4 without the Emergency Manager being involved or the
5 Chapter 9 filing with the Emergency Manager, that in
6 either case PA 436 did not require the governor to
7 impose any contingencies on the bankruptcy filing?

8 MR. SHUMAKER: Objection, calls for legal
9 conclusion.

10 A. I don't recall if I had done a deep dive in that
11 question at this time. Please understand, counselor,
12 at this time I was doing a preliminary review of the
13 statute based upon I believe some published reports
14 and a look at it online. I may have gotten to that
15 point, I just don't recall if at this time during that
16 day I had.

17 Q. Okay.

18 A. But I did at some point.

19 Q. But you certainly knew that ultimately?

20 A. At some point I did, sure.

21 Q. Obviously. And then you go on in the next sentence in
22 this email to say, "So although the new law provides
23 the thin veneer of a revision, it is essentially a
24 redo of the prior rejected law and appears to merely
25 adopt the conditions necessary for Chapter 9 filing."



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1 A. Yes, I said that.

2 Q. And were you writing truthfully when you said that?

3 A. Yeah, and I think the balance of the paragraph, the
4 news reports state that opponents of the prior law are
5 already lining up to challenge this law. So as I just
6 testified, this was my preliminary analysis based upon
7 a number of sources, some of them were the news
8 reports.

9 Q. And you were aware in fact that as you just indicated
10 that there were either challenges already made or that
11 were going to be made to the law?

12 A. I was not aware that there were challenges already
13 made. I was aware the news report states that
14 opponents of the prior law were already lining up to
15 challenge the law.

16 Q. And did you have any understanding at this time as to
17 what those grounds of challenge were or may be?

18 A. No. As I said, this was, you know, within the span of
19 a day when this was going back and forth about what it
20 may require, I was beginning to familiarize myself to
21 some degree with the statute.

22 Q. Your email goes on to say you're going to speak with
23 Baird in a few minutes and see what his thinking is.

24 A. Yes.

25 Q. Did you speak with Mr. Baird that day?



1 potential ground for challenge, was that it allowed
2 the governor to authorize a bankruptcy filing without
3 imposing a condition that would prevent pension
4 obligations from being impaired?

5 A. I don't know if I was aware of that issue at this
6 time, no.

7 Q. Well, were you aware -- you became aware of it if not
8 then at some point shortly thereafter; correct?

9 A. Yeah, let me say this. There was no broad based
10 concern at this point about with what the authority
11 was with regards to pensions so any sort of
12 insinuation that that was the focus at this point is
13 just inaccurate. That wasn't true. This as I said
14 before was a very cursory and initial sort of review
15 of what I was being asked to do so when I had a
16 discussion with Mr. Baird later I would have some
17 information and that's what I gleaned based upon a few
18 hours since apparently I got the call -- I was
19 informed that day, that morning or the day before to
20 the time I was going to have a call that afternoon.

21 Q. But I take it at some point in time you became aware
22 that Article 9, Section 24 of the Michigan
23 Constitution protects pension benefits from being
24 diminished or impaired?

25 A. I believe at some point in time I became aware that



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1 Article 9, Section 24 purports to protect pensions and
2 benefits in certain circumstances, yes.

3 MR. ULLMAN: Let's mark Exhibit 5.

4 (Marked Exhibit No. 5.)

5 Q. Exhibit 5 is just a printout of Article 9, Section 24
6 of the Michigan Constitution. Do you recognize it as
7 such?

8 A. I mean, the document speaks for itself, but that
9 appears to be what it is, yes.

10 Q. Okay, and I think your last answer you said that in
11 your view Section 24, Article 9 purports to protect
12 pensions and benefits in certain circumstances.

13 A. Yes.

14 Q. And are you contending that the words of Article 9,
15 Section 24 means something other than what they say?

16 MR. SHUMAKER: Objection, calls for legal
17 conclusion.

18 A. Yeah, I -- here again, I think the document speaks for
19 itself. I think that my response to that issue is
20 throughout the arc of my career, whether in federal
21 government or in private practice at the Chrysler
22 case, there have been many state laws, some of them
23 quite sacrosanct, that have been abrogated by federal
24 law, not just bankruptcy law. At the RTC we preempted
25 state, New York state, rent control litigation, law;



1 we preempted California state escheat law; we
2 preempted -- and that was the model for 50s. In
3 Chrysler, we preempted 50 states have dealer franchise
4 laws that were preempted. So when I said I recognize
5 this, there are federal laws that preempt state laws.

6 MR. ULLMAN: I'm going to move to strike as
7 nonresponsive.

8 Q. Mr. Orr, I appreciate your perhaps trying to be
9 helpful, but my question was really very limited and I
10 would appreciate it if you could just answer it.

11 MR. ULLMAN: Could I have my question read
12 back, please?

13 (Record read back as requested.)

14 A. I think that calls for a legal conclusion and I
15 contend that they speak for themselves.

16 Q. Now, you made mention in your -- I think when you were
17 giving your prior response, you made some allusion to
18 federal law.

19 A. Uh-huh.

20 Q. Is there any question in your mind that apart from
21 anything that may come into play under federal law,
22 that the constitution of Michigan, Article 9, Section
23 24, prohibits pension rights from being diminished or
24 impaired?

25 MR. SHUMAKER: Objection, calls for legal



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1 conclusion.

2 A. The document, as I said, speaks for itself. Certainly
3 I think I've said before that parties can negotiate a
4 resolution of contracts.

5 Q. That's -- that's not my question.

6 MR. ULLMAN: Could you -- can you read my
7 question back? If there's anything about it you don't
8 understand, I would be glad to rephrase.

9 THE WITNESS: Uh-huh.

10 (Record read back as requested.)

11 MR. SHUMAKER: Objection to form, calls for
12 legal conclusion. You can answer.

13 A. Yeah, I think it does call for legal conclusion, but
14 as I said, contractual obligations can be negotiated
15 at any time.

16 Q. Let me rephrase it.

17 You understand what the constitution is
18 talking about is diminishing or impairing is
19 nonconsensual; correct?

20 MR. SHUMAKER: Objection, calls for legal
21 conclusion.

22 Q. Let me rephrase it so there can't be any ambiguity.
23 Clearly parties can if they so choose change their
24 contract; rights?

25 A. Yes.



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1 Q. Is there any question in your mind that Article 9,
2 Section 24 of the Michigan Constitution protects
3 pension rights from being diminished or impaired if
4 the beneficiaries of those rights do not agree
5 consensually to such diminishment or impairment?

6 MR. SHUMAKER: Objection, calls for legal
7 conclusion.

8 A. I think I've answered that before. I think there's
9 certain federal laws that allow for preemption --

10 Q. I'm asking about independent of any federal law. The
11 Michigan Constitution on its own, apart from any
12 overlay that you say may apply from federal law, is
13 there any question that the Michigan Constitution,
14 assuming that the beneficiaries of the retirement
15 obligations don't consent, any question that in that
16 circumstance the Michigan Constitution prohibits
17 pension rights from being diminished or impaired?

18 MR. SHUMAKER: Objection, calls for legal
19 conclusion.

20 A. Here again, Mr. Ullman, you're asking me -- I'm a fact
21 30(b)(6) witness, you're asking me for a legal
22 conclusion about what the statute says. I'll say that
23 the statute speaks for itself and I certainly have
24 heard that people take that position.

25 Q. Okay, and I'm asking you -- I'm not asking you to give



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25 Q. And you read it before you became Emergency Manager;



24 Q. Isn't it clear at this point that it was envisioned
25 and understood that Kevyn Orr, you Mr. Orr, were in



25 Q. Okay. And we're talking -- these conversations, are



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22 Is there anything in PA 436 that allows in
23 your view the Emergency Manager to impact or adversely
24 affect pension rights in the absence of a Chapter 9
25 bankruptcy filing?



24 Q. And for health, the health benefits, which we saw that
25 were, what, under the current scenario something like



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25 Q. Right. And if the liabilities were really greater



1 than the diminution from the steady state to the
2 restructuring scenario would be greater than 80
3 percent; wouldn't it?

4 A. It might be. I mean, we've said 80 percent. I mean,
5 199.5 less 25, you know, you just roughly cut those in
6 half, that's a 12 and 1/2 percent, but you know, 88
7 percent, somewhere in that neighborhood.

8 Q. Now, the people who are -- the retirees who are
9 getting impacted from these -- by these cuts in the
10 proposed restructuring, these are who? These are men
11 and women who previously served the City and are now
12 retired?

13 A. Yeah, they're two pension plans: one for General
14 services and the other for Police and Fire.

15 Q. And these individuals that serve the City in both
16 public safety and nonpublic safety capacities?

17 A. Uniform and nonuniform, yes.

18 Q. And were these -- I guess the issue comes because the
19 pension liabilities and the healthcare benefits that
20 may be due are not -- there's not sufficient funding
21 that was put into them; correct?

22 A. Well, the healthcare benefit has no funding, the
23 \$5.7 billion. And the pension underfunding has our
24 estimate of the level of underfunding, the unfunded
25 portion of the pensions, in them. There are assets



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25 MR. ULLMAN: That wasn't my question. Can



21 Q. And I don't think that's fully responsive at this
22 point. Had you identified anything else as of June 14
23 to get this plan implemented, any other course,
24 putting aside consensual resolution, other than a
25 chapter 9 file?





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Q. And it says 2012 PA 436 provides that my approval of the recommendation to commence a Chapter 9 proceeding may place contingencies on such a filing and it gives



1 the citation. It continues, I am choosing not to
2 impose any such contingencies today. Federal law
3 already contains the most important contingency, a
4 requirement that the plan be legally executable,
5 11 U.S.C. Section 943(b)(4). Do you see that?

6 A. Yes.

7 Q. And did you have any discussions with the governor or
8 anyone from his staff about that language before you
9 received this letter back?

10 A. No.

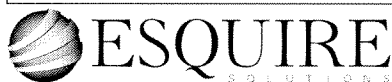
11 Q. Were you -- did you have any understanding before
12 receiving this that as to whether or not the governor
13 was going to place any contingencies on the bankruptcy
14 filing?

15 A. No, but I was concerned about it.

16 Q. And what were you concerned about?

17 A. I was concerned that the governor might place some
18 contingency in any regards, not just related to the
19 pensions and others, but that the inner array on
20 limiting what authority I might have would impact what
21 discretion I would have under either 436 or Chapter 9.
22 I was just concerned about contingencies.

23 Q. And was one of the contingencies that you were
24 concerned about the contingency that could impair your
25 ability or restrict your ability to cut back the



1 Q. And did you have any plan in place as to what you
2 would do if the letter came back that imposed a
3 contingency that in any Chapter 9 filing nothing could
4 be done that would affect pension rights that were
5 protected under the Michigan Constitution?

6 A. No.

7 Q. Now, in his letter the governor -- the portion we've
8 just looked at on the back of page 5, the governor
9 says, having a legally executable plan under Section
10 943(b)(4). That's a reference, 943(b)(4), the
11 bankruptcy code; isn't it?

12 A. I believe so.

13 Q. So he says, he the governor says, having a legally
14 executable plan under Section 943(b)(4) of the
15 bankruptcy code is a contingency for Detroit's filing
16 a bankruptcy petition. Correct?

17 MR. SHUMAKER: Objection, document speaks
18 for itself.

19 A. That's -- I was going to say the document speaks for
20 itself. You're sort of reading it, you know, just
21 inversing it, but it says federal law already contains
22 the most important contingency requirement that the
23 plan is legally executable.

24 Q. Right. And this is in the context of him asking or
25 noting that under PA 436 he could, he the governor,



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1 could place contingencies on a Chapter 9 filing;
2 right?

3 A. Yes.

4 Q. And he goes on to say that federal law also contains
5 what he calls the most important contingency on the
6 Chapter 9 filing, that it be legally executable;
7 correct?

8 A. Yes, the letter speaks -- that's the language of the
9 letter.

10 Q. Did you agree with the governor's analysis here?

11 A. I -- do I agree? Yes, I mean, I agree that that's the
12 most important contingency that we get to, yes.

13 Q. Now, petition was filed -- the bankruptcy petition was
14 filed on July 18th, like at 4 in the afternoon, 4:05,
15 something like that?

16 A. That's what I was told. I don't know the specific
17 time.

18 Q. Now, in doing -- in making your bankruptcy filing,
19 were you intending to do something that was in
20 violation of state law?

21 MR. SHUMAKER: Objection, calls for legal
22 conclusion.

23 A. Here again, subject to all the discussions that we had
24 earlier today, I was intending to alleviate the City of a
25 very dire situation and provide it with the maximum



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1 telephone conversations with him and I recall meeting
2 with him. I don't recall whether it was prior or
3 after the filing. I know from time to time -- I just
4 don't recall when it was.

5 Q. Would there have been any reason for you not to
6 consult the Attorney General prior to the bankruptcy
7 filing on that issue?

8 A. No, I think the State Attorney General made his
9 position known prior to the filing.

10 Q. Now, as of this time the petition was filed there were
11 various state court litigations that had been begun?

12 A. Yes.

13 Q. And those challenged, among other things, PA 436;
14 correct?

15 A. Yes.

16 Q. And its constitutionality?

17 A. Yes.

18 Q. And in fact, the petition was filed just prior to the
19 start of a TRO hearing in one of those state
20 litigations; wasn't it?

21 A. I was told that either that night or the following
22 day.

23 Q. And are you aware that certain objectors in this
24 proceeding have stated that the bankruptcy petition
25 was filed just before the judge in the case was about



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1 to issue a TRO prohibiting the bankruptcy filing from
2 taking place?

3 A. I heard that after the fact, yes.

4 Q. And are you aware that these objectors have stated
5 that in fact the state lawyers asked for a short delay
6 before the ruling was issued so they could get the
7 bankruptcy filing in before the judge came down with a
8 TRO?

9 A. I don't know if I heard it -- I may have read that
10 later. I don't know if I heard it.

11 Q. Did you have any involvement in those actions?

12 A. No, no.

13 Q. Do you deny that that's what occurred?

14 A. I only know what I've heard and I have no personal
15 knowledge, I just know what I've heard and what I've
16 read.

17 Q. And isn't it correct that you wanted to get the
18 bankruptcy petition filed as soon as possible because
19 you knew there was a risk that the state might rule it
20 was illegal -- the state court might rule it was
21 illegal under state law for the bankruptcy proceeding
22 to be filed?

23 A. No, that wasn't the reason.

24 Q. Is there a particular reason that the bankruptcy
25 filing was made at 4:06 in the afternoon of the same



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1 day a TRO was being heard in the state court other
2 than to get the jump on the state court ruling?

3 MR. SHUMAKER: Object to the form.

4 A. Not to the best of my knowledge.

5 Q. Now, you're aware that the state court in that
6 litigation in fact later issued a ruling that PA 436
7 is unconstitutional to the extent that it authorizes a
8 proceeding under Chapter 9 in the way that could
9 threaten to impair or diminish accrued pension
10 benefits?

11 A. Yes, I was informed that there are I believe three
12 TROs after the bankruptcy filing.

13 Q. And you have proceeded with the bankruptcy petition
14 notwithstanding; correct?

15 A. Well, the bankruptcy petition had been filed. There
16 were open questions about the application of the stay.
17 There was also a question about an appeal, which was
18 taken up I believe by the Attorney General's office.
19 So when you say you proceeded with the petition, we
20 filed the petition, there was a ruling, and there were
21 appeals.

22 Q. Okay. And in light of the state court ruling that
23 PA 436 was unconstitutional, you did not take any
24 steps to withdraw the bankruptcy petition from filing;
25 did you?



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1 A. No.

2 Q. And you have not taken any steps to stop the
3 bankruptcy proceeding from going forward; have you?

4 A. No.

5 MR. ULLMAN: Would this be a good time to
6 stop for lunch, a quick lunch?

7 MR. SHUMAKER: Sure.

8 MR. ULLMAN: I'm ready to continue but I
9 know --

10 THE WITNESS: You got another -- how much
11 -- do you have another line of inquiry? Whatever
12 everybody --

13 MR. ULLMAN: I'm about to switch subject
14 matters.

15 THE VIDEOGRAPHER: Going off the record at
16 12:52 p.m.

17 (Luncheon recess between
18 12:52 p.m. and 1:30 p.m.)

19 THE VIDEOGRAPHER: We're back on the record
20 at 1:35 p.m.

21 BY MR. ULLMAN:

22 Q. Welcome back, Mr. Orr.

23 A. Good afternoon.

24 Q. One other question about the June 14th proposal.
25 Referring to page 98, we talked about the defined



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1 contribution benefit plan?

2 A. Yes.

3 Q. Okay. Is it correct that under that plan
4 contributions are being made only for people who would
5 be current City employees?

6 A. Will the plan be closed?

7 Q. Yes.

8 A. Yes, I believe so.

9 Q. So under the restructuring plan there would be no
10 pension contributions made for retirees; correct?

11 A. I believe that's correct.

12 Q. Now, you I believe said that the June 14th proposal
13 was presented at a meeting to representatives of
14 various creditors, I think you said that in your
15 declaration?

16 A. On June 14th, yes.

17 Q. Okay. Did you speak at that meeting?

18 A. Yes.

19 Q. And who else spoke?

20 A. I believe all -- several members of our team, I
21 believe it was Mr. Heiman, David Heiman, I believe it
22 was Ken Buckfire, I believe Heather Lennox was on, I
23 believe Bruce Bennett was there, I believe Ken
24 Buckfire may have spoken. I'm trying to recall if
25 there was anyone else.



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24 Q. And as of July 17, had the City, you or anyone working
25 for you, told any union or retiree association that it



25 Q. Now, in your declaration do you recall making



1 Q. And on the pension side of things has there been any
2 change from what was set out in the June 14th
3 proposal? As I understand this, it's still a defined
4 contribution plan for current employees and no
5 contributions being made by the City for retired --
6 for retirees; is that right?

7 MR. SHUMAKER: Object to the form.

8 A. Yeah, the general consensus is that you would close
9 the plan and there would be contributions for
10 currents, yes.

11 Q. And so again, just to be clear, that means for
12 retirees no ongoing contributions provided by the
13 City?

14 A. None other than their participation in the note that's
15 proposed in the June 14th proposal.

16 Q. And with no new funding for their pensions the
17 payments will stop -- to the retirees would stop being
18 made when the retirement funds run out; is that right?

19 A. That's a loaded question. I mean, the -- and the
20 reason I say it's a loaded question, some of the
21 retirement funds have said their payments won't run
22 out so that's why we want to have a dialogue. We
23 think they're at risk. They've told us they're not.

24 Q. And by the City's estimation the pension funding will
25 run out when? If no new funds are put in?



1 unreasonable assumptions either way. But your general
2 question as to whether or not if the information going
3 in was inaccurate, revealed an inaccurate result, I
4 think it's true as a matter of just common sense and
5 logic.

6 Q. And the same thing as to assumptions. If the
7 assumption made was wrong, then the output would be
8 wrong also?

9 A. I think that's why we asked several times to have a
10 discussion about the assumptions that are necessary
11 for pension benefits.

12 Q. Now, the cash flows that are being reported in your
13 declaration, those do not include any assumptions as
14 to the monetization of various assets that the City
15 continues to hold; is that right?

16 MR. SHUMAKER: This is paragraph 56 that
17 you're referring to, counsel?

18 MR. ULLMAN: Yeah, I'm looking in general.

19 MR. SHUMAKER: In cash flow?

20 MR. ULLMAN: Yeah, cash flow.

21 A. You're talking about generally do the cash flows
22 include any monetization of any City assets?

23 Q. Yeah.

24 A. No, they do not.

25 Q. And obviously if assets currently held by the City



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25 Q. Outright. Now, is it correct that the City has



25 | A. Possibly, yes.



25 A. As a result of Judge Cox's opinion, it has separate



22 A. Those are commercially sensitive so I don't want to
23 interfere. Suffice it to say, the -- Judge Cox's
24 opinion spoke to the possibility of creating an
25 authority that would remove the water and sewer



1 when you talk about values, there's a range of values
2 from asset disposition and outright sale and
3 privatization to creating an operation or an authority
4 where someone has brought in, as has been done in
5 Washington, D.C., to actually operate the garages and
6 meters. So we're looking at a range of alternatives
7 to determine what those values could be.

8 Q. What's the range of values you're looking at so far?

9 A. We don't have that yet.

10 Q. How concrete have you -- let me withdraw that.

11 What specific steps have been taken so far?

12 A. Our investment advisors and consultants are beginning
13 discussions with various parties that undertake these
14 types of operations within a range of alternatives to
15 try to assess values.

16 Q. And the investment advisors, would that be Buckfire?

17 A. Yeah, it would be our investment banker, Ken Buckfire,
18 Miller Buckfire.

19 Q. Okay. In the June 14th proposal you also make
20 reference to about 22 square miles of land that the
21 City owns?

22 A. City-owned land, yes.

23 Q. Do you have an understanding as to the value of that
24 land?

25 A. I've been informed that some of the value is at best



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24 A. The City has a \$6 million maintenance obligation and
25 that would be taken up by the state so that wouldn't



2 Q. And are you aware of any cases where, to use your
3 phraseology, as a result of a Chapter 9 filing by a
4 municipality the state constitution was trumped?

6 Q. Yes.

9 MR. ULLMAN: Okay, I have no more questions
0 at this time. But I may reserve the right, we have
1 some other people that are going to ask questions, at
2 the end of that to ask some follow-ups, if that's
3 possible.

15 MR. SHUMAKER: You want to take a quick
16 break?

19 THE VIDEOGRAPHER: Going off the record at
20 2:53 p.m.

22 THE VIDEOGRAPHER: We're back on record at
23 3:07 p.m.

25 BY MS. LEVINE:



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1 Q. At the time the City filed for bankruptcy, was it your
2 view that there had to be significant cuts in accrued
3 vested pension amounts for both active and currently
4 retired persons?

5 A. Yes.

6 Q. And is it still -- still your view today?

7 A. Yes, based upon our analysis, yes.

8 Q. This conclusion that there must be significant cuts in
9 accrued vested pension amounts for both active and
10 currently retired persons, was that assertion or that
11 idea or that notion discussed by you with the governor
12 at any time before June 14th, 2013?

13 A. Outside of meetings with attorneys?

14 MR. SHUMAKER: Outside of meetings or calls
15 with attorneys present.

16 Q. Yeah, I'm not looking to infringe your attorney-client
17 privilege.

18 A. I know. I just don't recall all of the meetings. It
19 may have been discussed outside those meetings.

20 Q. Well, do you have a recollection?

21 A. I do not have a recollection of specific discussions.

22 Q. Just so I understand your testimony, are you saying it
23 was -- it may have been discussed but you're not sure
24 whether or not it was discussed in meetings that were
25 outside the attorney-client privilege? Is that your



4 Q. Did you ever say to the attendees at the meetings or
5 communicate to the attendees in writing that the City



1 movement on it.

2 Q. So as things now stand, there's no plan to put forward
3 anything else if the creditors and in particular the
4 retirees do not agree to what's set out in the June
5 14th proposal?

6 A. As it stands right now, we don't have a plan.

7 MR. ULLMAN: I have nothing further. Thank
8 you, Mr. Orr.

9 MR. SHUMAKER: Thank you, counsel.

10 THE WITNESS: Thank you.

11 THE VIDEOGRAPHER: Going off the record at
12 5:41 p.m.

13 (Discussion held off the record.)

14 THE VIDEOGRAPHER: We're back on the record
15 at 5:43 p.m.

16 EXAMINATION

17 BY MS. GREEN:

18 Q. Hi, Mr. Orr. We've met before.

19 A. Yes.

20 Q. My name is Jennifer Green, I represent the two
21 Retirement Systems for the City of Detroit.

22 A. Yes, Jennifer -- Ms. Green. Good to see you again.

23 Q. Thank you. Nice to see you again too.

24 I have a question about Exhibit 11. I
25 don't know if you have it in front of you or not.



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My Commission Expires: 9-19-18

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IN RE) Chapter 9

CITY OF DETROIT, MICHIGAN,) Case No. 13-53846

Debtor.) Hon. Steven W. Rhodes

Friday, October 4, 2013

File Number: 105824



2 A. -- for the City who had been
3 retained, the City representatives were there and
4 the State representatives were there.

7 A. Review team --

9 Okay --

11 Q. -- so as I understand what you're
12 saying, the -- the -- the slides themselves were
13 present -- given over to the review team as a --
14 a -- a bound --

16 Q. -- volume or attached in some way?

17 A. Yes, the -- the -- the slide deck as
18 the pitch book was given to the review team.

19 Q. Okay. And then, at the presentation,
20 were -- how did that work? Did you -- did people
21 sort of go through the slides orally and then --
22 and -- and make comments as they were going



1 through the different pages in the pitch book?

2 A. No. As I recall, we handed out the
3 pitch book and began sort of going through the
4 slide, but within the first page or two, the
5 discussion exceeded the slides. And we really
6 ended up not going through the pitch book in any
7 meaningful manner --

8 Q. Okay.

9 A. -- at the presentation.

10 Q. Okay. And this -- at the time of the
11 presentation, you were indeed still part of
12 Jones Day --

13 A. Yes.

14 Q. -- and part of the pitch team?

15 A. Yes, absolutely.

16 Q. Okay.

17 Okay. I'm going to mark another
18 document, Mr. Orr, and ask if you've ever seen
19 this, which is Number 22.

20 A. Two.

21 MR. ULLMAN: Here's a copy for you,
22 two copies for you, and an extra, and an extra. I



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1 don't want to bring these back with me is all.

2 - - -

3 (Whereupon, City of Detroit -
4 Restructuring Plan, Mayor's
5 Implementation Progress Report was
6 marked, for identification purposes,
7 as Orr Deposition Exhibit
8 Number 22.)

9 - - -

10 THE WITNESS: Thank you.

11 BY MR. ULLMAN:

12 Q. Okay. What we've marked as
13 Exhibit 22, Mr. Orr, is entitled, City of Detroit
14 - Restructuring Plan, Mayor's Implementation
15 Progress Report, with the date of March 2013.

16 Have you ever seen this document
17 before?

18 A. I think I've seen it before, but I
19 think that was after I became emergency manager.

20 Q. Okay. That's fine.

21 And what I'd like to do is try to
22 just ask you about one page of this.



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22	A.	Um-hum.
----	----	---------



1 Q. It says, Pension unfunded
2 liabilities, and the first bullet point says,
3 Approximately 650 million of unfunded liability as
4 of fiscal year 2012, of which only 250 million
5 relates to general fund.

6 A. Yes, I see that.

7 Q. And do you have an understanding as
8 to what's being said there and what that reference
9 is?

10 MR. SHUMAKER: Objection: foundation.

11 THE WITNESS: Yeah. I was obviously
12 not responsible for drafting, developing or the
13 due diligence behind the document. The document
14 speaks for itself.

15 But what I think is being said there
16 is that the unfunded liability for the -- and I
17 assume it's speaking to both pension funds; it may
18 be one or the other --

19 BY MR. ULLMAN:

20 Q. Um-hum.

21 A. -- but the unfunded liability for
22 fiscal year 2012 is 250, and 250 million of that



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1 is somehow an obligation of the general fund.

2 Q. Okay. Did you say 250? It's -- you
3 meant to say 650, right?

4 A. No, no. It's 650 total --

5 Q. Right.

6 A. -- but 250 million of that is an
7 obligation of the general fund.

8 Q. You had misspoken and said 250 both
9 times --

10 A. Oh, I'm sorry --

11 Q. -- so --

12 A. -- oh, no -- okay. 650 and 250, I'm
13 sorry. I was --

14 Q. Okay.

15 A. -- thinking ahead, thinking quicker
16 than my mouth moved.

17 Q. Okay. And as I -- I understand that
18 the 650 million that's referred here -- to here by
19 the Mayor corresponds pretty closely, if I recall,
20 to the \$644 million figure that was referred to in
21 the June 14th proposal; is that right?

22 A. I would -- I -- yes, I -- I would



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22 O. -- because I think that's what you



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22 Q. Okay. And what is your understanding



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1 A. I could go back and check it to be
2 sure, but I think that's the approximate mechanism
3 as I understand it.

4 Q. Okay. Now, by my math -- I make no
5 representations as to my math, but just looking at
6 the numbers, it looked -- actually, do I have a
7 calculator here? I don't think I do.

8 What percentage is 250 over 650? I
9 actually didn't do the math.

10 A. Four -- it's 40-some odd.

11 Q. It's 40-some -- yeah, we can get it
12 precisely.

13 Zero? Oh.

14 250 divided by 6 -- let's say 650 --
15 shoot, I didn't do that right. I apologize. Let
16 me try to clear this and do it again.

17 250 divided -- 6. This isn't right.

18 Okay. It looks like about
19 38 percent.

20 A. Right.

21 Q. Okay. You recall that -- that during
22 the last deposition, you indicated that you



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1 thought that the actual unfunded liability was --
2 was higher than the 644 number and could be as
3 much as 3.5 billion or something like that?

4 A. Yes.

5 Q. Okay. My question is, does the --
6 does the -- is the proportion of unfunded
7 liability allocable to the general fund versus the
8 Department of Water Sewer personnel constant if
9 you -- if you use a higher liability figure?

10 In other words --

11 A. If we went up to 3.5 --

12 Q. Yeah, yeah --

13 A. -- million, would it be --

14 Q. -- would the Department of Water and
15 Sewer still be approximately 38 percent of the
16 total unfunded liability?

17 A. I'm -- I'm not sure. I would think
18 that a rough estimate might be. But as I said, I
19 think, in September 16th, part of those
20 calculations had to do with a number of factors,
21 so I don't want to say that my testimony is as
22 exactly proportioned.



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With Attorney General Schuette, I don't recall the exact date; but, generally speaking, the Attorney General -- at the meeting, as I said, was Mr. Heiman on the phone, the Attorney General and an attorney from his office, Matt, whose last name escapes me right now. And generally what was said, the Attorney General wanted to express why he felt duty-bound to take a position that the Michigan State Constitution protected vested pension obligations.

2 A. But, remember, I said that you have
3 to be careful with trying to draw a straight-line
4 comparison between the two numbers you may
5 calculate in. But generally speaking, if we're
6 just talking about the math, that -- that --

8 A. -- would be the estimate.

12 A. Yes.

19 A. It -- it -- it might roughly hold.
20 but you need to be careful to not draw the
21 conclusion that is -- it's exactly comparable.



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2 Q. Okay.

6	A.	Um-hum.
---	----	---------

9 A. Yes.

12 A. Yes, other [sic] employee benefits.

18 A. You -- you know, I think it is; but
19 I'm not recalling that mechanism as well as I
20 recall the pension mechanism, but I think it is.


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3 A. It might well be, but I'd need to
4 confirm that.

5 Q. Okay. And have you done any analysis
6 of that question?

7 A. Yes --

8 Q. Okay.

9 A. -- well, our contractors have done an
10 analysis of the question.

11 Q. Okay. And who specifically has done
12 an analysis of that?

13 A. Oh, I think our team at -- the entire
14 team: Conway MacKenzie, Ernst & Young,
15 Miller Buckfire.

16 Q. And do you recall their general
17 conclusions to what percentage of the total
18 unfunded OPEB liability is allocable to the -- A,
19 to the Department of Water of Sewer; or, B, some
20 other fund or entity apart from the general fund?

21 A. I'm -- I'm not -- I don't recall if
22 it is, and I don't recall the percentage.


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C E R T I F I C A T E

DISTRICT OF COLUMBIA:

I, Cindy L. Sebo, a Notary Public within
and for the Jurisdiction aforesaid, do hereby
certify that the foregoing deposition was taken
before me, pursuant to notice, at the time and place
indicated; that said deponent was by me duly sworn
to tell the truth, the whole truth, and nothing but
the truth; that the testimony of said deponent was
correctly recorded in machine shorthand by me and
thereafter transcribed under my supervision with
computer-aided transcription; that the deposition is
a true record of the testimony given by the witness;
and that I am neither of counsel nor kin to any
party in said action, nor interested in the outcome
thereof.



Cindy L. Sebo
District of Columbia, Notary Public
My Commission Expires
April 14, 2015

Cindy L. Sebo, RMR, CRR, RPR, CSR,
CCR, CLR, RSA, Notary Public



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From: CN=Kevyn Orr/O=JonesDay
Sent: 1/31/2013 3:45:47 PM
To: CN=Corinne Ball/O=JonesDay@JonesDay
CC: "Stephen Brogan" <sjbrogan@jonesday.com>
Subject: Re: D

CB,

Thank you for thinking about alternative ways to skin this cat. But I don't think we should look at this right now for at least two reasons. First, the state already has EMs appointed or five cities and four school districts. I wouldn't want it to seem like I have a special deal. Second, in thinking about the EM position I went back and looked at the SIGTARP legislation and the federal law authorizing the creation of the D.C. Control Board in 95. Both gave those managers tremendous powers, but neither was subject to questions about the authority of the Congress to enact them and the President's authority to sign them into law. By contrast Michigan's new EM law is a clear end-around the prior initiative that was rejected by the voters in November. The new EM law gives local governments four choices to fix their financial emergency:

Consent Agreement, in which local leaders remain in charge but must meet certain conditions in an agreement negotiated with the state (Detroit is already under a CA and it sounds like it's not working);
A state appointed EM that has broad authority over local finances;
Chapter 9 bankruptcy with the Governor's approval; and
Mediation, in which the local government and interested parties meet with a neutral party to resolve financial issues, such as employee contracts (this is essentially required to file a Chapter 9 petition).

So although the new law provides the thin veneer of a revision it is essentially a redo of the prior rejected law and appears to merely adopts the conditions necessary for a chapter 9 filing. The news reports state that opponents of the prior law are already lining up to challenge this law.

Nonetheless, I'm going to speak with Baird in a few minutes to see what his thinking is. I'll let you know how it turns out. Thanks.

Kevyn

Kevyn D. Orr
51 Louisiana Ave. NW, Washington, DC 20001-2113 • Direct: 202.879.5560 • Fax:
202.626.1700 •
Cell: Redacted korr@jonesday.com

From: Corinne Ball/JonesDay
To: "Kevyn Orr" <korr@jonesday.com>
Cc: "Stephen Brogan" <sjbrogan@jonesday.com>
Date: 01/31/2013 08:10 AM
Subject: D

Kevyn--

Food for thought for your conversation with Baird and us --
I understand that the Bloomberg Foundation has a keen interest in this area. I

Exhibit	
Exhibit No.:	4
Name:	Orr
Date:	9-16-13
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JD-RD-0000295

was thinking about whether we should talk to Baird about financial support for this project and in particular the EM. Harry Wilson--from the auto task force--told me about the foundation and its interest. I can ask Harry for contact info--this kind of support in ways "nationalizes" the issue and the project.

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EXHIBIT B

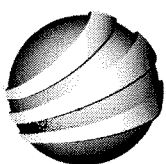
TO THE DECLARATION OF CLAUDE D. MONTGOMERY, ESQ.

In the Matter Of:
IN RE CITY OF DETROIT, MICHIGAN

13-53846

GAURAV MALHOTRA

September 20, 2013



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SOLUTIONS

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1 So they were looking at those forecasts in isolation.
2 But that work sort of stopped I think right around in
3 the first four or five months of the engagement.

4 Q. And why did that work stop?

5 A. It was because the focus continued to be
6 on the general fund and these were self-sustaining
7 funds with respect to at least the Water and Sewer
8 Department. And so they were monitoring their -- and
9 dealing with their cash activity, although connected
10 to the City, but we weren't helping forecast receipts
11 and disbursements because they were not impacting the
12 general fund.

13 Q. You previously testified in your prior
14 deposition that Ernst & Young was not asked to look at
15 possible disposition of City assets, is that correct?

16 A. That's correct.

17 Q. Why -- did you have a discussion with the
18 City regarding whether that would be valuable work for
19 Ernst & Young to provide?

20 MR. STEWART: Objection.

21 BY THE WITNESS:

22 A. I -- I'm not sure I follow the question.

23 BY MS. BRUNO:

24 Q. How did it come about that Ernst & Young



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1 didn't evaluate the value of disposition of some of
2 the City assets?

3 A. It was not a part of our scope of work.

4 Q. You would agree that there could be cash
5 value to the disposition of some of those assets,
6 would you not?

7 MR. STEWART: Objection.

8 BY THE WITNESS:

9 A. I think that's a better question to ask
10 for the City's investment banker.

11 BY MS. BRUNO:

12 Q. Well, I'm not talking about the specific
13 numbers here, but you know what some of the assets
14 available to the City are, correct?

15 A. In general, yes.

16 Q. And you understand that some of those
17 assets could be valuable or quite valuable, correct?

18 MR. STEWART: Objection.

19 BY THE WITNESS:

20 A. It depends on what assets you are talking
21 about.

22 BY MS. BRUNO:

23 Q. Why don't we look at Exhibit No. 4 -- oh,
24 I'm sorry. I'll hand it to you. Exhibit No. 4 from



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1 your prior deposition, I'll hand it to you. It was
2 the Proposal For Creditors --

3 A. Okay.

4 Q. -- dated June 14.

5 And I believe the assets are identified on
6 90. And it is 90 of the computer generated numbers on
7 the bottom.

8 And on pages 90 through 96, the
9 presentation discussed various assets that the City
10 could derive some cash benefit from, correct?

11 MR. STEWART: Objection.

12 BY THE WITNESS:

13 A. Yes.

14 BY MS. BRUNO:

15 Q. And, well, I don't want to quarrel or even
16 discuss with you what the actual specific value of any
17 one of those assets are, but you would agree that the
18 implementation of any of these proposals would improve
19 the City's cash position, would it not?

20 MR. STEWART: Objection.

21 BY THE WITNESS:

22 A. Here is what I would say. The current
23 ten-year projections right now do not include any
24 incremental proceeds that could be available to the



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1 City from asset sales. And that's where I -- because
2 that's what's very clearly laid out in the proposal.

3 If there are proceeds available that are
4 available to the City, those numbers would change.
5 But I can at least highlight and articulate what the
6 assumptions are with respect to the ten-year forecast
7 that the City has put out.

8 BY MS. BRUNO:

9 Q. And so your assumptions include that none
10 of these assets will be disposed of in any way, is
11 that correct?

12 A. That's generally correct.

13 Q. Sticking with Exhibit No. 4 before you, if
14 you'd turn to page 80 of the document. I'm sorry. I
15 should say 87 of the computer generated numbers.

16 And this is a portion of the presentation
17 that discusses increasing the tax collection. You
18 look like you are on a different page than I am here.

19 A. 87.

20 Q. You've got it?

21 A. Yes.

22 Q. You would agree that increasing the tax
23 collection rates and improving the collection of past
24 due taxes could materially improve the City's



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REPORTER'S CERTIFICATE

I, JULIANA F. ZAJICEK, C.S.R. No. 84-2604,
a Certified Shorthand Reporter, do hereby certify:

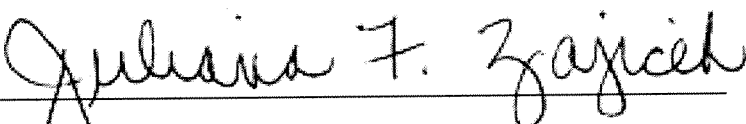
That previous to the commencement of the
examination of the witness herein, the witness was
duly sworn to testify the whole truth concerning the
matters herein;

That the foregoing deposition transcript
was reported stenographically by me, was thereafter
reduced to typewriting under my personal direction and
constitutes a true record of the testimony given and
the proceedings had;

That the said deposition was taken before
me at the time and place specified;

That I am not a relative or employee or
attorney or counsel, nor a relative or employee of
such attorney or counsel for any of the parties
hereto, nor interested directly or indirectly in the
outcome of this action.

IN WITNESS WHEREOF, I do hereunto set my
hand on this 21st day of September, 2013.


JULIANA F. ZAJICEK, Certified Reporter



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EXHIBIT C

TO THE DECLARATION OF CLAUDE D. MONTGOMERY, ESQ.

In Re: City of Detroit, Debtor

*Governor Richard D. Snyder
October 9, 2013*

*Moretti Group
471 W. South Street
Suite 41B
Kalamazoo, MI 49007
800-536-0804*



Original File 100913RS.TXT

Win-1-Scriptor with Word Index

09:55:47 1 Q. Okay. Let me direct your attention -- strike that.
09:55:54 2 Let me back up.

09:55:55 3 Did you put your comments in writing to
09:55:58 4 anyone -- your comments about the June 14th, 2013
09:56:02 5 proposal, did you put your comments in writing to
09:56:04 6 anyone whether by letter or email or phone text or
09:56:08 7 in any other written format?

09:56:09 8 A. I don't believe so. I don't believe so.

09:56:13 9 Q. Let me now turn your attention to page 109 of
09:56:21 10 Exhibit 3, and I'm going to in particular read the
09:56:30 11 second line of the third bullet point from the
09:56:34 12 bottom. It says "There must be significant cuts in
09:56:39 13 accrued vested pension amounts for both active and
09:56:42 14 currently retired persons."

09:56:45 15 Were you aware that the proposal said this?

09:56:49 16 A. I'm aware the proposal said that in the context that
09:56:53 17 this was to be a negotiation and a mutual agreement
09:56:56 18 between parties.

09:56:56 19 Q. My only question was --

09:56:57 20 A. Yeah.

09:56:57 21 Q. -- were you aware that this proposal said this?

09:57:00 22 A. Yes.

09:57:00 23 Q. And you were aware that at the time that you signed
09:57:05 24 what's been marked as Exhibit 2, the July 18th
09:57:07 25 letter, you were aware that the proposal contained

09:57:10 1 the language I just read, correct?

09:57:12 2 A. Yes.

09:57:14 3 Q. So you were aware when you signed the July 18th,
09:57:24 4 2013 letter that it was Kevyn Orr's view that there
09:57:30 5 had to be significant cuts in accrued pension
09:57:32 6 liabilities, correct?

09:57:34 7 A. I would say it was Kevyn Orr putting a proposal out
09:57:38 8 to parties to say he believed this was necessary to
09:57:41 9 achieve an outcome, that they would need to agree to
09:57:44 10 that.

09:57:45 11 Q. I'm not sure that was responsive. Let me try that
09:57:49 12 question again.

09:57:49 13 A. Okay.

09:57:50 14 Q. Isn't it correct that at the time that you signed
09:57:54 15 your July 18th letter that you were aware that it
09:58:00 16 was Kevyn Orr's position that there had to be
09:58:01 17 significant cuts in accrued pension benefits?

09:58:04 18 A. Yes.

09:58:05 19 Q. Did you speak to Kevyn Orr about -- strike that.

09:58:12 20 Did you agree with that position as of
09:58:15 21 July 18th? And by the position I mean that there
09:58:19 22 had to be significant cuts in accrued pension
09:58:21 23 liabilities?

09:58:23 24 A. The approval of my letter was not addressing that as
09:58:27 25 an issue. It was about authorizing a bankruptcy.

CERTIFICATE

STATE OF MICHIGAN)
) SS:
COUNTY OF OAKLAND)

I, LAUREL A. JACOBY, Certified Shorthand reporter, a Notary Public, hereby certify that I recorded in shorthand the examination of GOVERNOR RICHARD D. SNYDER, the deponent in the foregoing deposition; and that prior to the taking of said deposition the deponent was first duly sworn, and that the foregoing is a true, correct and complete transcript of the testimony of said deponent.

I further certify that no request was made for submission of the transcript to the deponent for reading and signature and that no such submission was made.

I also certify that I am not a relative or employee of a party or an attorney for a party; or financially interested in the action.

LAUREL A. JACOBY, CSR-5059, RPR

Notary Public, Oakland County, Michigan

My commission expires: 9/1/18

Dated: This 11th day of October, 2013.

EXHIBIT D

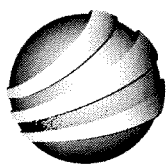
TO THE DECLARATION OF CLAUDE D. MONTGOMERY, ESQ.

In the Matter Of:
CITY OF DETROIT, MICHIGAN

Case No. 13-53846

LAMONT SATCHEL

September 19, 2013



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1 A. Yes.

2 Q. I didn't mean to.

3 A. I was not aware of that.

4 Q. And as regards pension benefits, which is what we've
5 been looking at, do you know whether the plan, the
6 proposal that was presented by the City on September
7 11 changed in any way from what it presented first on
8 June 14th and then again on June 20th?

9 A. I haven't -- I'm not aware of nor have I seen a
10 proposal that the City made on September 11.

11 Q. So you don't know one way or the another?

12 A. I don't.

13 Q. Okay, fair enough.

14 Now, is it -- to your knowledge can someone
15 or a retiree, for example, look at the information
16 that's contained in S18 and be able to figure out
17 monetarily what the total impact of this proposal is
18 on that particular individual?

19 A. I don't know.

20 Q. Okay. And you think that's something that someone
21 would want to be able to understand in order to
22 analyze a proposal that's being made and respond
23 intelligently to it?

24 MR. MILLER: Object to form. Calls for
25 speculation.



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1 A. Could you rephrase that?

2 MR. ULLMAN: Can you repeat it?

3 (Record read back as requested.)

4 A. What's the that?

5 Q. Being able to understand the monetary impact to the
6 affected individual of what is being proposed. If I
7 were presenting you with a proposal, you would want to
8 understand how -- a proposal that purports to affect
9 how much money you're going to get, how many benefits
10 you're going to receive, you would want to know what
11 the monetary impact on you is overall in order to
12 think about it, understand it and respond to; true?

13 A. If it had a monetary impact and --

14 MR. MILLER: Let me interpose an objection.
15 Object to form.

16 Q. You can answer the question.

17 A. If it had a monetary impact and I had an interest in
18 that regard, I would. If I didn't, I wouldn't.

19 Q. Okay. Now, we talked about the June 20 meeting. What
20 I'm going to do is show you two documents. I'm going
21 to have them marked serially, but I'm going to show
22 them to you at the same time and then ask you about
23 them because they're related; okay?

24 A. All right.

25 MR. ULLMAN: So we're going to mark these



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1 State of Michigan)

2 County of Genesee)

3 Certificate of Notary Public

4 I certify that this transcript is a complete, true and
5 correct record of the testimony of the witness held in this
6 case.

7 I also certify that prior to taking this deposition,
8 the witness was duly sworn or affirmed to tell the truth.

9 I further certify that I am not a relative or an
10 employee of or an attorney for a party; and that I am not
11 financially interested, directly or indirectly, in the
12 matter.

13 WITNESS my hand this 20th day of September,
14 2013.

15

16

17



18

Jeanette M. Fallon, CRR/RMR/CLR/CSR-3267

19

Certified Realtime Reporter

20

Registered Merit Reporter

21

Certified LiveNote Reporter

22

Certified Shorthand Reporter

23

Notary Public, Genesee, Michigan

24

Acting in Oakland County, Michigan

25

My Commission Expires: 9-19-18



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EXHIBIT E

TO THE DECLARATION OF CLAUDE D. MONTGOMERY, ESQ.

Page 1

1 IN THE UNITED STATES BANKRUPTCY COURT
2 EASTERN DISTRICT OF MICHIGAN
3 SOUTHERN DIVISION
4
5 In re Chapter 9
6 CITY OF DETROIT, MICHIGAN, Case No. 13-53846
7 Debtor. Hon. Steven W. Rhodes
8 _____/
9
10 DEPONENT: MAYOR DAVE BING
11 DATE: Monday, October 14, 2013
12 TIME: 10:27 a.m.
13 LOCATION: CITY OF DETROIT MAYOR'S OFFICE
14 2 Woodward Avenue
15 11th Floor Conference Room
16 Detroit, Michigan
17 REPORTER: Jeanette M. Fallon, CRR/RMR/CSR-3267
18
19
20
21
22
23
24
25

Page 2

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16 Residents of the City, Mayor's Office and City Council
17
18
19
20
21
22
23
24 ALSO PRESENT:
25 Patrick Murphy, videographer

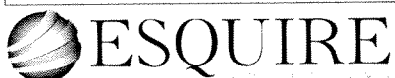


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<p style="text-align: right;">Page 45</p> <p>1 Q. Well, did you -- as part of this initial -- this</p> <p>2 restructuring program, were you aware in any way that</p> <p>3 anything that was being proposed was contrary to the</p> <p>4 laws or Constitution of the State of Michigan?</p> <p>5 A. No.</p> <p>6 Q. And do you recall specifically how if at all the</p> <p>7 pension liabilities were to be dealt with under your</p> <p>8 proposed approach?</p> <p>9 A. No.</p> <p>10 Q. Would that be set out in whatever documents there are</p> <p>11 that describe your initiatives?</p> <p>12 A. I didn't understand your question.</p> <p>13 Q. Would the approach to pensions be set out in whatever</p> <p>14 documents exist that describe the initiatives that</p> <p>15 you've referred to?</p> <p>16 A. Those probably were internal meetings between the CFO</p> <p>17 and the COO and probably people from the labor</p> <p>18 department. Those aren't meetings that I sat in.</p> <p>19 Q. So you don't recall the specifics of how the pension</p> <p>20 issues were --</p> <p>21 A. No.</p> <p>22 Q. -- being dealt with?</p> <p>23 A. No.</p> <p>24 Q. But as you understood it, the City's -- if the</p> <p>25 proposed restructuring, the initiatives that you put</p>	<p style="text-align: right;">Page 47</p> <p>1 A. He was agreeable in working together, but we didn't go</p> <p>2 step by step and say that I agree or I don't agree.</p> <p>3 Q. Okay. So did you have an understanding as when you</p> <p>4 left that meeting in DC whether Mr. Orr had in fact</p> <p>5 agreed to the points that were set out in this summary</p> <p>6 of partnership document?</p> <p>7 MR. CULLEN: Objection, foundation, form.</p> <p>8 A. One of the areas that I do recall and me saying is</p> <p>9 that it made reference to keeping the executive team</p> <p>10 intact. He wanted the opportunity to make an</p> <p>11 assessment himself.</p> <p>12 Q. Okay, and did he make an assessment?</p> <p>13 MR. CULLEN: Objection, foundation, form.</p> <p>14 A. I think over the time that he's been here, I don't</p> <p>15 think he personally made an assessment. I think there</p> <p>16 were others who may have made an assessment and made</p> <p>17 recommendations to him.</p> <p>18 Q. And was your team -- your executive team left intact?</p> <p>19 A. No.</p> <p>20 Q. And who was gotten rid of besides Mr. Andrews, if</p> <p>21 anyone?</p> <p>22 A. Jack Martin is no longer here as the CFO. Karla</p> <p>23 Henderson, who was the group executive for planning</p> <p>24 and development and BC, is no longer here. I think</p> <p>25 before Kevyn came on Kirk Lewis was already gone. I</p>
<p style="text-align: right;">Page 46</p> <p>1 in place went through, you believe that the City would</p> <p>2 be able to survive without bankruptcy and would</p> <p>3 continue to be able to meet its legal obligations?</p> <p>4 MR. CULLEN: Objection, foundation, form.</p> <p>5 A. The answer would be we wanted that opportunity.</p> <p>6 Q. Okay. And you thought that if you had that</p> <p>7 opportunity, you could make it happen; is that right?</p> <p>8 A. That would be correct.</p> <p>9 Q. But you weren't given that opportunity; were you?</p> <p>10 A. That is correct.</p> <p>11 Q. Let me go back to what we've marked as Orr Exhibit --</p> <p>12 that we haven't marked but we've identified as Orr</p> <p>13 Deposition Exhibit 7, which has the proposed summary</p> <p>14 of partnership.</p> <p>15 A. Uh-huh.</p> <p>16 Q. Was this partnership agreement, the document that</p> <p>17 appears here where it has a draft label on it, was</p> <p>18 that ever made final?</p> <p>19 A. Not to my knowledge.</p> <p>20 Q. When you met with Mr. Orr on -- at the end of February</p> <p>21 in DC, you indicated that you discussed this with him,</p> <p>22 though; correct?</p> <p>23 A. Correct.</p> <p>24 Q. And did he tell you that he was -- that he was</p> <p>25 agreeable to it?</p>	<p style="text-align: right;">Page 48</p> <p>1 do think that Chris Brown was already gone. As of</p> <p>2 today our purchasing director is no longer here,</p> <p>3 Andre DuPerry. Richard Kay, who was the director of</p> <p>4 the lighting department, is no longer here. The</p> <p>5 director of DDOT is no longer here. I think there --</p> <p>6 that's right off the top of my head. I think there</p> <p>7 were nine or ten department heads that are no longer</p> <p>8 here.</p> <p>9 Q. And were they asked to leave by Mr. Orr or --</p> <p>10 A. For the most -- for the most part, yes. There was one</p> <p>11 guy who headed up -- he was the director of homeland</p> <p>12 security, he left on his own accord because of the</p> <p>13 environment that he felt he could no longer work in,</p> <p>14 but for the most part all of those other people were</p> <p>15 asked to leave.</p> <p>16 Q. Now -- and are the positions that those people held</p> <p>17 vacant or have they been replaced with other people?</p> <p>18 A. There's a mixed bag, quite frankly. I mean, some of</p> <p>19 them -- I think you got some consultants in some of</p> <p>20 those positions. I mean, I had no input at all. I</p> <p>21 mean, I found out after the fact that either people</p> <p>22 were removed or if somebody was coming in. I had -- I</p> <p>23 never had the opportunity to interview even the new</p> <p>24 CFO who came in, the new COO who came in. Those were</p> <p>25 selected by Kevyn in a vacuum, as far as I'm</p>



<p>1 concerned.</p> <p>2 Q. Moving on past February of 2013, as I recall, the</p> <p>3 official appointment of Mr. Orr as the emergency -- I</p> <p>4 forget whether it was the Emergency Financial Manager</p> <p>5 or Emergency Manager, but it took place sometime</p> <p>6 around the end of March. Is that generally consistent</p> <p>7 with your recollection?</p> <p>8 A. Yeah, I think March 25th was his first day.</p> <p>9 Q. And from the meeting in DC up to March -- say March</p> <p>10 25th, did you have any conversations with Mr. Orr?</p> <p>11 A. I may have had one phone -- one other phone</p> <p>12 conversation with him.</p> <p>13 Q. And do you recall what the substance of that call was</p> <p>14 about?</p> <p>15 A. I think more than anything else it was making sure</p> <p>16 that when he came on board, we were having a press</p> <p>17 conference, introducing him as the Emergency Financial</p> <p>18 Manager and wanted me to stand with he and the</p> <p>19 Governor at that, because we didn't want, quote</p> <p>20 unquote, a divided house, if you will, and I thought</p> <p>21 it was better since an Emergency Manager was coming on</p> <p>22 board, it was no sense in us continuing to fight that.</p> <p>23 If he could be helpful to turn this City around, it</p> <p>24 would be better we do it together.</p> <p>25 Q. So in that phone conversation was there any discussion</p>	<p>Page 49</p>	<p>1 We knew that this plan was going to negatively impact</p> <p>2 a lot of folks in order for us to move forward with</p> <p>3 implementation, but it was all about trying to manage</p> <p>4 our way through without going to the route of</p> <p>5 bankruptcy.</p> <p>6 Q. And this was a document that was put together by you</p> <p>7 and people on your team; is that right?</p> <p>8 A. That would be correct.</p> <p>9 Q. And I see we've been going for a little over an hour,</p> <p>10 an hour and 20 minutes. It's probably a good time for</p> <p>11 a break, but let me ask you first up to this time this</p> <p>12 is now March 13, towards the -- by the end of March</p> <p>13 had you had any conversations with anyone else from</p> <p>14 the Governor's staff or with the Governor himself</p> <p>15 about Mr. Orr as the Emergency Financial Manager or</p> <p>16 the Emergency Manager?</p> <p>17 MR. CULLEN: Objection, foundation, form.</p> <p>18 You can address the question.</p> <p>19 A. It was obvious to me in this time frame that Lansing</p> <p>20 had made their selection, so, I mean, that's something</p> <p>21 that I couldn't control so it was more important to</p> <p>22 me, once again, to be part of the team to help fix the</p> <p>23 City as opposed to constantly fighting and pushing --</p> <p>24 and pushing back. I didn't think that would get us</p> <p>25 anywhere.</p>	<p>Page 51</p>
<p>1 of Chapter 9 filing?</p> <p>2 A. No.</p> <p>3 Q. Was there any discussion of anything related to</p> <p>4 pensions?</p> <p>5 A. No.</p> <p>6 Q. I'm going to show you another document, Mr. Mayor,</p> <p>7 which we'll mark as Bing Number 3.</p> <p>8 (Marked Exhibit No. 3.)</p> <p>9 Q. For the record what we've marked as Bing Exhibit --</p> <p>10 what is this, 4? Three. Actually I think we had</p> <p>11 previously marked this as Exhibit 22 to the Orr</p> <p>12 deposition, but since I've forgotten about that, now</p> <p>13 we'll just leave it as Bing Number 3, but I believe it</p> <p>14 is the same document.</p> <p>15 Do you recognize this document, Mr. Mayor?</p> <p>16 A. Yes.</p> <p>17 Q. For the record it's entitled City of Detroit</p> <p>18 Restructuring Plan, dated March 23, begins with Bates</p> <p>19 number DTMI00129416.</p> <p>20 A. Yes.</p> <p>21 Q. And just briefly tell me what this is and I'll ask you</p> <p>22 a few questions about it.</p> <p>23 A. Well, it speaks to the things that we were working on,</p> <p>24 the recommendations that we had put together to get us</p> <p>25 through a very tumultuous time in the City of Detroit.</p>	<p>Page 50</p>	<p>1 Q. Okay. So after you had your initial conversations</p> <p>2 with Baird in February, you then met with Orr in the</p> <p>3 end -- towards the end of February also in DC, and</p> <p>4 then Orr -- there was an official announcement at the</p> <p>5 end of March saying Orr's the new EM or the new EFM.</p> <p>6 Prior to the meeting in DC and the official</p> <p>7 announcement of Orr, did you have any contact with</p> <p>8 anyone from the State about Mr. Orr's being made the</p> <p>9 Emergency Manager or Emergency Financial Manager?</p> <p>10 A. The answer would be very little, if any, because they</p> <p>11 had the right to make the decision, they made the</p> <p>12 decision, so once again, I would prefer to work with</p> <p>13 the individual seeing what we could do together to fix</p> <p>14 the City, a broken City.</p> <p>15 Q. Okay, so let me just ask more directly. Did you have</p> <p>16 advanced notice before the public announcement that</p> <p>17 the City -- the State was going to come out and make</p> <p>18 an announcement saying Kevyn Orr is our man?</p> <p>19 A. Yes.</p> <p>20 Q. And when were you told?</p> <p>21 A. That had to be in early -- early to mid March.</p> <p>22 Q. And do you remember the specifics of that discussion,</p> <p>23 who told you what was said?</p> <p>24 A. Whether that was Rich Baird or Andy Dillon, it wasn't</p> <p>25 the Governor.</p>	<p>Page 52</p>



Page 57

1 A. Yes, it did.
2 Q. And was that taken out of your hands also?
3 A. Yes, it was.
4 Q. And that like the other real estate you mentioned was
5 taken out of your hands by the Emergency Manager and
6 his team I take it?
7 A. The whole process --
8 MR. CULLEN: Objection, foundation, form.
9 A. -- yeah.
10 Q. And did there come a time when someone -- how did this
11 process come about that it was taken out of your
12 hands? Did the Emergency Manager or someone from his
13 staff actually tell you or your staff, don't worry
14 about these things anymore, it's not your business or
15 words to that effect?
16 MR. CULLEN: Objection.
17 A. No.
18 MR. CULLEN: Foundation, form.
19 Q. How did it come about that it was taken out of your
20 hands?
21 A. I actually went to the Emergency Manager and told him
22 about these potential deals and in order for them to
23 go forward, he had to sign-off on it. He said to me
24 that it looked like they were decent deals and that he
25 would, but obviously that hasn't happened yet.

Page 58

1 Q. And has there been any follow-up with the Emergency
2 Manager between him and you as to why he hasn't signed
3 off?
4 MR. CULLEN: Objection, foundation, form.
5 A. I think more than anything else he wants to look at
6 some of the bigger issues that he's got to deal with
7 as opposed to these things which he may consider, you
8 know, not big issues.
9 Q. Even though if these things went through, they would
10 at least bring in some immediate cash; is that right?
11 A. They would.
12 Q. As part of the asset monetization, did you give any
13 consideration to try to monetize art that is owned by
14 the City of Detroit and maintained at the Detroit
15 Institute of Arts?
16 A. The answer would be no.
17 Q. And was there a particular reason you didn't give any
18 consideration to that?
19 A. Back at that time when we were thinking about it, that
20 never came up, that was never a conversation that we
21 had internally. I think since he's been on board, the
22 subject obviously has gotten a lot of heat and a lot
23 of visibility. I'm not sure what's going to happen
24 there.
25 Q. Okay. And do you -- let me ask it this way.

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1 Did you as of the March 2013 time frame
2 have any understanding, just a general understanding,
3 as to what the value was of the art that's owned by
4 the City of Detroit?
5 MR. CULLEN: Objection, foundation, form.
6 A. The answer would be no.
7 Q. And as you sit here today, do you have any
8 understanding as to the value of the art that's owned
9 by the City of Detroit?
10 MR. CULLEN: Same objection.
11 A. The answer would still be no.
12 Q. Are you aware of reports in the press stating that the
13 city-owned art could easily be worth billions of
14 dollars?
15 A. I have read that, yes.
16 Q. And do you have any reason to believe those reports
17 are inaccurate?
18 MR. CULLEN: Objection, foundation, form.
19 Of what they report or the value or what, counsel?
20 MR. ULLMAN: I think my question was clear.
21 Q. You can answer my question.
22 A. I know that he's engaged Christie's to do an
23 evaluation and I'm not sure that that's complete yet,
24 so I have no idea of what the value may or may not be.
25 Q. Okay. Let me ask you to turn now to the next page of

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1 this document, which is ending in Bates page 422. And
2 this heading says, and I quote, "The Mayor's plan
3 includes strategies to implement changes that will
4 significantly reduce general fund long-term
5 liabilities."
6 Do you see that?
7 A. Yes.
8 Q. And so we're clear, what in brief is the general fund?
9 A. That's the -- the general fund is what we use to run
10 the City on a day-to-day basis.
11 Q. Now, in subpoint A, 3A, you give some -- you give two
12 subpoints, two bullets. The second one says,
13 approximately 6 billion of City debt is owed by the
14 water and sewer department and does not have an impact
15 on the general fund. Do you see that?
16 A. Yes.
17 Q. Can you explain what you were referring to by those
18 words?
19 A. That -- that debt is paid by the users of the water
20 and sewerage department, so there's a revenue stream
21 that pays that debt down, so it's not part of the
22 general fund.
23 Q. Okay, and as you put it here, that that debt, while
24 it's on the books as City debt because the department
25 of water and sewer is part of the City, that doesn't,



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<p style="text-align: right;">Page 61</p> <p>1 as you put it, have an impact on the general fund</p> <p>2 because it's -- the water and sewer debt is paid for</p> <p>3 by the department of water and sewer?</p> <p>4 A. That would be correct.</p> <p>5 Q. And that, as I understand it, is run as a separate</p> <p>6 authority and has its own books and records and is</p> <p>7 solvent; is that right?</p> <p>8 A. That would be correct.</p> <p>9 Q. You then go on in the next point, sub B, to refer to</p> <p>10 pension unfunded liabilities, and you say</p> <p>11 approximately 650 million of unfunded liability as of</p> <p>12 FY 2012 of which only 250 million relates to general</p> <p>13 fund.</p> <p>14 A. Uh-huh.</p> <p>15 Q. Do you see that? And could you tell me what you meant</p> <p>16 when you wrote that?</p> <p>17 MR. CULLEN: Objection, foundation, form.</p> <p>18 A. I believe that makes reference to both the payment to</p> <p>19 the pension fund and maybe even to the healthcare</p> <p>20 benefits.</p> <p>21 Q. Okay, I'm going to be a little more specific. The</p> <p>22 language of this restructuring plan states that</p> <p>23 there's 650 million of unfunded pension liability. Do</p> <p>24 you see that?</p> <p>25 A. Uh-huh.</p>	<p style="text-align: right;">Page 63</p> <p>1 pensions and if you look on page 124, it talks about</p> <p>2 the unfunded AAL on line 3 of that table.</p> <p>3 A. Uh-huh.</p> <p>4 Q. And which stands for unfunded actuarial -- as I</p> <p>5 understand it, actuarial accrued liability?</p> <p>6 A. Correct.</p> <p>7 Q. And then if you look at the table, it says for the</p> <p>8 General Retirement System there's a number of</p> <p>9 approximately 640 million and on the Police and Fire</p> <p>10 Retirement System it's about 4 million. Do you see</p> <p>11 that?</p> <p>12 A. Yes.</p> <p>13 Q. And is it correct that that -- so that adds up to</p> <p>14 about 644 million. Does that correspond to the</p> <p>15 650 million that's in the restructuring plan that we</p> <p>16 have as Exhibit 3?</p> <p>17 A. Yes, yes.</p> <p>18 MR. CULLEN: Objection, foundation, form.</p> <p>19 Q. And when you -- the restructuring document refers to</p> <p>20 the unfunded liability at fiscal year 2012, is that</p> <p>21 referring to the valuation that's referred to at the</p> <p>22 top of page 124 of Bing 4 where it says, and I quote,</p> <p>23 "The funded status of each plan as of June 30, 2011,</p> <p>24 the most recent actuarial valuation date, is as</p> <p>25 follows" and then gives a table?</p>
<p style="text-align: right;">Page 62</p> <p>1 Q. And then it says of that only 250 million relates to</p> <p>2 the general fund.</p> <p>3 Can you tell me what that's referring to?</p> <p>4 A. No, not right off the top of my head I can't, no.</p> <p>5 Q. So you don't recall what that level of detail is as to</p> <p>6 the --</p> <p>7 A. Correct, correct, correct.</p> <p>8 Q. Then the next bullet it -- well, I guess -- do you</p> <p>9 recall where the 650 million liability -- unfunded</p> <p>10 liability number comes from?</p> <p>11 A. We have not -- we're not current with our pension</p> <p>12 contributions.</p> <p>13 Q. I guess let me ask it a little -- let me mark then</p> <p>14 another document. We'll mark this as Bing 4.</p> <p>15 (Marked Exhibit No. 4.)</p> <p>16 Q. And Bing 4 for the record is an excerpt from a</p> <p>17 document entitled Comprehensive Annual Financial</p> <p>18 Report for the City of Detroit for its fiscal</p> <p>19 year-ended June 30, 2012 and I've attached just two</p> <p>20 pages of it because it's a very long document.</p> <p>21 Okay, Mr. Mayor? You've seen -- you know</p> <p>22 what the Comprehensive Annual Financial Report is;</p> <p>23 right?</p> <p>24 A. Yes.</p> <p>25 Q. And I've attached the pages that pertain to the</p>	<p style="text-align: right;">Page 64</p> <p>1 MR. CULLEN: Objection, foundation, form.</p> <p>2 A. And your question was?</p> <p>3 MR. ULLMAN: Do you want to read it back?</p> <p>4 If you don't understand, I'll rephrase it, but --</p> <p>5 THE WITNESS: Yes. I just need --</p> <p>6 Q. Would it be easier if I just rephrased the question?</p> <p>7 A. Go ahead.</p> <p>8 Q. Okay. When you referred to the approximately</p> <p>9 650 million of unfunded liability as of fiscal year</p> <p>10 2012, okay, the unfunded liability as of 2012, is that</p> <p>11 referring to the underfunding as reported as of the</p> <p>12 June 30, 2011 actuarial valuation which is referred to</p> <p>13 on the top of page 124?</p> <p>14 A. The answer would be --</p> <p>15 MR. CULLEN: Objection, foundation, form.</p> <p>16 When you say when you refer, you mean -- are you</p> <p>17 implying that he wrote this document personally?</p> <p>18 MR. ULLMAN: No, he and his team.</p> <p>19 Q. I'm obviously referring to that in the general sense.</p> <p>20 I didn't intend to imply that you physically drafted</p> <p>21 this, Mr. Mayor. I understand this was put together</p> <p>22 by you and people working for you.</p> <p>23 A. And the answer to that would be yes.</p> <p>24 Q. And also under this -- going back to page 422 of</p> <p>25 Exhibit 3 under the subheading B under pension</p>



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1 unfunded liabilities it says, the City is developing a
2 plan to reduce the unfunded liability.
3 Do you have any recollection as to the
4 specifics of that plan?
5 A. No, I don't.
6 Q. Now, you recall -- or let me ask you.
7 Are you aware that on June 14th, 2013 the
8 Emergency Manager had a meeting with creditors?
9 A. I'm aware.
10 Q. Prior to the time that he was appointed or I should
11 say -- let me withdraw that.
12 Prior to the time that the Emergency
13 Manager's appointment was formally announced and June
14 14, 2013, did you have any conversations with the
15 Emergency Manager himself?
16 A. Yes.
17 Q. And do you recall how many?
18 A. We don't -- we don't meet that often. You know, if we
19 meet once or twice a week, that's about it and the
20 meetings are usually very short meetings. Usually
21 called by me.
22 Q. And can you say how long a typical meeting would last?
23 A. Thirty minutes tops.
24 Q. During that time between March 25th and June 14th do
25 you recall any discussions with the Emergency Manager

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1 concerning pensions, anything to do with pensions?
2 A. I -- yes.
3 Q. And tell me what you recall.
4 A. You know, the general conversation was that pensions
5 are a major problem that we have and we've got to
6 address it.
7 Q. And do you recall when those conversations took place?
8 A. Probably more in the May time frame.
9 Q. And was there any conversation with the Emergency
10 Manager as to how the Emergency Manager intended to
11 address the issues of pensions?
12 A. No.
13 Q. Was there any discussion with the Emergency Manager
14 during the period I've been asking about, the end of
15 March and June 14, about the City's filing for Chapter
16 9 bankruptcy?
17 A. I think the only conversations we may have had about
18 that is that's the last resort and that's from him
19 saying, you know, that's not the direction we want to
20 go in and it would be last resort.
21 Q. Did the emergency -- did you have any discussions with
22 the Emergency Manager in which he indicated that he
23 had any approaches or thoughts as to how to address
24 issues relating to pensions other than filing for
25 Chapter 9 bankruptcy?

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1 A. No.
2 Q. And did you have any conversations with him in which
3 he specifically referred to a Chapter 9 bankruptcy as
4 a way to deal with the pension issues?
5 A. I believe the answer to that would be yes. I can't be
6 very specific, I don't recall, but I think -- I
7 believe that conversation -- or a conversation like
8 that did occur.
9 Q. Okay, and can you give me, as best you can recall, a
10 time frame as to when?
11 A. I think it would be in that same May time frame in one
12 of our discussions.
13 Q. And can you tell me with as much specificity as you
14 can remember what the Emergency Manager said during
15 that conversation?
16 A. Once again, with not a lot of specifics, but in order
17 to fix the problems of the City where -- I know this
18 number has been thrown out a lot, the \$3.5 billion of
19 unfunded liabilities, etc., etc., I mean, he talked
20 about that, but that was a generality and so it was no
21 more -- it was not more specific than that.
22 Q. But he referred to Chapter 9 as a way to get rid of or
23 address what he referred to as a 3.5 billion unfunded
24 liability?
25 A. As a possibility.

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1 MR. CULLEN: Objection, foundation, form.
2 You can answer.
3 A. As a possibility.
4 Q. And did Mr. Orr tell you at that time that the
5 unfunded liability was indeed 3.5 billion?
6 A. The answer to that would be yes.
7 Q. And did he tell you that that had been shown through
8 an actuarial valuation?
9 A. The answer to that would be yes.
10 Q. During that conversation or any other conversation
11 with Mr. Orr during the March 25 through June 14 time
12 frame, was there any discussion with Mr. Orr of what
13 we've referred to previously and I've shown you the
14 pension clause in the Michigan Constitution or any
15 other legal impediments to -- affecting pension
16 rights?
17 A. No.
18 Q. Let me ask you the same questions now -- well, let me
19 preface it by saying you're aware, of course, that
20 there was a bankruptcy filing on July 18.
21 A. That would be correct.
22 Q. Okay. Now, during the period between June 14, that
23 was when the creditor proposal was issued, and the
24 filing, did you have any conversations with Mr. Orr?
25 A. About?



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<p style="text-align: right;">Page 117</p> <p>1 Q. Did you hire them?</p> <p>2 A. No.</p> <p>3 Q. Who retained them?</p> <p>4 A. I think -- once again, most of these companies were</p> <p>5 being -- they were being pressed by the -- we were</p> <p>6 pressed by the State to my understanding, the State</p> <p>7 had a lot of input into the selection process and in</p> <p>8 some cases where the City has a responsibility for</p> <p>9 paying part of the fees, you know, I've always had a</p> <p>10 problem that I was not at the table to participate in</p> <p>11 the selection process.</p> <p>12 Q. Do you pay part of the fees for Miller Buckfire?</p> <p>13 A. Yes.</p> <p>14 Q. Does the State pay part of the fees for Miller</p> <p>15 Buckfire?</p> <p>16 A. Yes.</p> <p>17 Q. Does the NERD Fund pay part of the fees for Miller</p> <p>18 Buckfire?</p> <p>19 A. I wouldn't know that.</p> <p>20 Q. Do you have a copy of Miller Buckfire's retention or</p> <p>21 engagement letter?</p> <p>22 A. I would think we have that. I don't -- I don't have</p> <p>23 it personally, but I would think we do in the purchase</p> <p>24 department and maybe in the law department.</p> <p>25 MS. LEVINE: We would request a copy of</p>	<p style="text-align: right;">Page 119</p> <p>1 administrations in my -- in my perspective a lot of</p> <p>2 that should have been written off a long time ago but</p> <p>3 they've been carrying it on books and I just think</p> <p>4 that's the wrong approach.</p> <p>5 Q. Under your administration were -- how many -- how much</p> <p>6 did you write-off in what you believe to be</p> <p>7 uncollected taxes?</p> <p>8 A. I'm not sure of that. I would have to get with the</p> <p>9 CFO.</p> <p>10 Q. Do you have an approximate number?</p> <p>11 A. No, I don't.</p> <p>12 MS. LEVINE: I don't have anything further.</p> <p>13 Thank you.</p> <p>14 THE WITNESS: Thank you.</p> <p>15 MR. GREEN: No, I don't have any questions.</p> <p>16 MR. CULLEN: We don't need the Pistons</p> <p>17 question on the record?</p> <p>18 MR. ESSAD: No.</p> <p>19 MR. CULLEN: Thank you very much.</p> <p>20 THE VIDEOGRAPHER: This completes the</p> <p>21 deposition. We're off the record, 1:22.</p> <p>22 (Deposition concluded at 1:22 p.m.)</p> <p>23 * * *</p> <p>24</p> <p>25</p>
<p style="text-align: right;">Page 118</p> <p>1 that letter. I know that there's been a lot of</p> <p>2 documents that have been produced but we didn't happen</p> <p>3 to see what in there so we would make that specific</p> <p>4 request.</p> <p>5 MR. GREEN: And if I may add the 2012</p> <p>6 engagement letter from Miller Buckfire as well. I</p> <p>7 understand they were initially engaged the prior year.</p> <p>8 There may be two engagement letters.</p> <p>9 MR. MOSS: Please put that in a letter so</p> <p>10 we make sure we get it part of the record. We'll take</p> <p>11 a look.</p> <p>12 MS. LEVINE: So the request will be for any</p> <p>13 engagement letters or contracts with Miller Buckfire</p> <p>14 and we'll clarify that.</p> <p>15 Q. During the deposition last week with Treasurer Dillon</p> <p>16 he made a reference to a report with regard to certain</p> <p>17 tax write-offs or uncollected taxes. Are you familiar</p> <p>18 with that?</p> <p>19 A. No, I'm not. Not specifically.</p> <p>20 Q. Are you familiar with any issue with regard to</p> <p>21 potential tax write-offs where the taxes could have</p> <p>22 been collected?</p> <p>23 MR. CULLEN: Objection, foundation, form.</p> <p>24 A. No, I'm not. You know, we've got uncollected taxes</p> <p>25 that go back ten, 12 years, and so prior</p>	<p style="text-align: right;">Page 120</p> <p>1 State of Michigan)</p> <p>2 County of Genesee)</p> <p>3 Certificate of Notary Public</p> <p>4 I certify that this transcript is a complete, true and</p> <p>5 correct record of the testimony of the witness held in this</p> <p>6 case.</p> <p>7 I also certify that prior to taking this deposition,</p> <p>8 the witness was duly sworn or affirmed to tell the truth.</p> <p>9 I further certify that I am not a relative or an</p> <p>10 employee of or an attorney for a party; and that I am not</p> <p>11 financially interested, directly or indirectly, in the</p> <p>12 matter.</p> <p>13 WITNESS my hand this 16th day of October,</p> <p>14 2013.</p> <p>15</p> <p>16 </p> <p>17</p> <p>18 Jeanette M. Fallon, CRR/RMR/CLR/CSR-3267</p> <p>19 Certified Realtime Reporter</p> <p>20 Registered Merit Reporter</p> <p>21 Certified LiveNote Reporter</p> <p>22 Certified Shorthand Reporter</p> <p>23 Notary Public, Genesee, Michigan</p> <p>24 Acting in Oakland County, Michigan</p> <p>25 My Commission Expires: 9-19-18</p>



To: Bing, Dave[BingD@detroitmi.gov]; Martin, Jack[MartinJack@detroitmi.gov]; Warfield, Robert[WarfieldR@detroitmi.gov]
Cc: Andrews, Kriss[AndrewsK@detroitmi.gov]
From: Kriss Andrews
Sent: Wed 7/10/2013 8:56:40 AM
Subject: Emergency Management

You have asked for some views of how the emergency management process is going and how it contrasts with what we were doing without regard to the Emergency Manager.

In answering this one needs to consider we did not have certain opportunities that the EM did, such as filing for bankruptcy, or credibly threatening to do so. Thus, unless we were allowed to operate under PA 436 (which we were not given the opportunity to do) we had to defer attacking certain of the long term obligations as we would not have been able to threaten bankruptcy.

We did attack both health care and pension, which the EM continued, and I would say continued well. They put in place the pension task force that I recommended after some irregularities surfaced which Jack's folks brought to our attention. They continued and I would say improved on the health care work we started. But Jack brought in the actuary they used, and that actuary was really key. So overall, in long term liabilities they continued and improved on what we started, and had tools we simply did not have. Overall I give them good marks in long term liabilities, but that does not mean they will be successful or we did poorly. We simply did not have the tools we needed and they are not done.

Operations are a different matter altogether. Kevyn did well attacking long term liabilities because we gave him a good headstart, it is an area he knows well, and he has the tools to be successful.

In operations he threw away the headstart we gave him, he frankly is not competent at all (in fact, he is embarrassingly incompetent and only listened to his equally incompetent staff) and did not well exercise the added powers he has. I would give him an A in long term liabilities and an F in operations. Given his limited background (legal representation really is all he has, since his other roles are so narrow and unrelated to running a complex operation) and the weak experience the folks from the state have (experienced folks around town will tell you Andy is resume light and highlights disastrous deals as his credentials), this is not surprising.

Since March 28 we have been forced sideways on operations, or simply been told to stand down. A few areas where progress has been slowed are as follows.

1. We should now be installing a new management team in DDOT. We diagnosed this problem correctly, ran a compliant RFP process, and were ready to choose MV as the manager when the EM slowed the process. Though he gave me a poor excuse for doing so, it does not hold water. In addition, he told me a disaster at DDOT would not be a problem for him since it would highlight how screwed up the city is. So I guess the good citizens of Detroit can wait for busses that do not come because it is not inconvenient to Kevyn for them to do so.
2. We should also be progressing on providing a new management team in PLD. As I have said, it is not operationally reasonable to conclude PLD can work through a several year wind-down. We need to outsource the management there and make the operations safe and reasonably compliant. The EM slowed the process here also, and said the same thing: a disaster at PLD would not be a bad thing because it would highlight how messed up the city is. Again, we can expose our employees to safety issues and violate federal regulations because it is not inconvenient to Kevyn to do so.
3. Similar issues surfaced around the lighting authority. After the authority could only get a workable agreement with us (which gave them what they needed but no more, since Detroit has no more) they went to Kevyn and got a deal which forces the City to put in more money than they need, sooner than they need it, while the city struggles. And they cut this deal without coordinating with us so we were just wasting our time since the Authority had softer hands to negotiate with than us.

4. The rest of the control of operations was equally incompetent. Ordering us not to coordinate with the consultants we hired to help us, putting in place very inexperienced staff that controlled things. Not listening to Conway MacKenzie. Every department and thinking person is left wondering.

They also pursued the wrong things, as follows.

1. Focussing on outsourcing solid waste first. While this may be something we should look at, no informed person puts it first. However, it was something they could do, so they focussed on what they could do, not on what needed to be done. Moreover, the announced savings of \$15 million are ridiculous. They have no idea what the savings are, presuming there are savings.

2. Moving PDD to DEGC. When I told Kevyn we had issued a plan to the state on this and said we had studied it carefully, Kevyn gave me a legalistic view of Annex B. It was clear Kevyn had his marching orders and logic and operations had nothing to do with his orders. This whole sordid matter you all know well and needs no more documentation. The state's plan is poorly thought out and will just create a mess.

3. Public Safety. While there is emotional appeal to putting in place a new Chief, not giving insiders a real shot and not going through a thorough search were poor choices. Hopefully this will turn out okay, but we should be able to rely on more than hope. Also, I am lost as to where we are on the choice of a consultant, which I also do not believe was followed wisely from a process standpoint.

There are many other areas that could be discussed, I am sure Jack and the Mayor can add to the above lists. The question is how do we stay honest and complete without sounding complaining and negative? There are signs they are realizing how poorly they have done in operations. But the inherent problem is they do not know what they do not know. And that is not changing. I doubt they have learned to look and listen, which is what is needed.

We can talk at your convenience (evenings are best, though today we are at sea and I could talk anytime) or when I get back. But we need to plan this communication well. How do we get out a message that helps matters?

This is especially so since the press has so poorly reported on matters and seems to just write what the state gives them. Apparently keeping peace with their sources of information (the state) is more important than critically thinking about what is happening and doing a little investigation. And the gag orders from Kevyn only support the very poor reporting.

But remember, though they have completed nothing to date, they get an A in my book in teeing up a reduction in long term liabilities. That is worth a lot; they could just do a lot more by looking and listening.

Kriss

Sent from my iPad
Krissandrews@hotmail.com
Cell 586-202-2035

EXHIBIT F

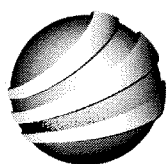
TO THE DECLARATION OF CLAUDE D. MONTGOMERY, ESQ.

In the Matter Of:
CITY OF DETROIT, MICHIGAN

Case No. 13-53846

CHARLES M. MOORE

September 18, 2013



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1 A. The rate of payouts is another area where the
2 actuaries make assumptions as to what benefits will be
3 paid in what periods and to the extent that those are
4 underestimated, that can impact the funded position as
5 well. Tying into previous assumptions that I had
6 indicated.

7 Q. So is it -- is it your position that the City views
8 the actuarial payout assumptions as understating
9 unfunded liabilities?

10 MR. MILLER: Object to form. Go ahead.

11 A. As an example, Mr. Ruegger, the actuarial valuation
12 assumes certain payouts. The actual payouts in the
13 most recent completed year of plan assets were
14 substantially higher than what was anticipated prior
15 to that valuation being done and so at a minimum that
16 would indicate that there were more assets that were
17 paid out than what was assumed by the actuary.

18 Q. Other than the assumptions and methods you've
19 identified, are there any other assumptions and
20 methods that to your understanding the City views as
21 understating the systems' unfunded liabilities?

22 A. The City and most importantly its actuary has not
23 completed its analysis on the unfunded position. The
24 City is trying to undertake a process to actually
25 develop a more concrete valuation model on its own so



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1 it's been relying on the valuation model of the
2 pension systems' actuary. As such we have focused on
3 a few items here, but until the City completes its
4 analysis and completes its own actuarial valuation,
5 neither the City nor its actuary nor I would be able
6 to say what all the assumptions are that could be used
7 to either overstate or understate the funded position.

8 Q. Very well.

9 Let's turn to one of the assumptions that
10 you address in your declaration and specifically in
11 paragraph 11 you talk about the projected net rate of
12 return. The 7.0 percent or 7.25 percent figure, do
13 you see that in paragraph 11?

14 A. Yes, sir.

15 Q. Those were not figures that were recommended by a
16 particular actuary; were they?

17 A. The 7 percent is actually higher than the rate that
18 Milliman, the City's actuary, had originally put
19 forward, which in its view would result -- the rate at
20 which there was a fifty-fifty chance of achieving that
21 rate.

22 MR. RUEGGER: All right. I'm going to move
23 to strike, because with all respect that was not
24 responsive to my question, Mr. Moore.

25 Q. I understand Milliman has prepared a variety of



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1 from an actuarial standpoint and no new benefits
2 accrued and you experience a 7.9 percent assumed rate
3 of return -- or actual rate of return, what would
4 happen to the plan assets.

5 Q. Let me ask you if you have Moore Exhibit 3 there, I
6 want to ask you a few questions with regard to that.

7 Let me direct you to page 95 of that
8 presentation. Hang on for a second. I'm sorry, I was
9 in the wrong place. Page 109. Looking at the heading
10 there, claims for unfunded pension liabilities.

11 A. Yes, sir.

12 Q. Were you involved at all in the drafting of that part
13 of this presentation?

14 A. I don't think I wrote that, but I was aware of this
15 language.

16 Q. Okay. How about the specifically the language of the
17 third bullet point? Because the amounts realized on
18 the underfunding claims would be substantially less
19 than the underfunding amount, there must be
20 significant cuts in accrued vested pension amounts for
21 both active and currently retired persons. Were you
22 involved in formulating that?

23 A. Yes, sir.

24 Q. And has the City -- I noticed in this presentation
25 there's no quantification of what -- of the cuts that



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1 would be -- that in the City's view must occur;
2 correct?

3 A. Correct.

4 Q. Has there been a specification of those level of cuts
5 that the City contends must occur?

6 MR. MILLER: Object to form.

7 Q. I mean, have you put a dollar amount on it?

8 A. No, and our analysis of this continues. Right now we
9 still don't know what assets could be available to put
10 towards the pensions. We still have not had the type
11 of dialogue that we would like to have related to the
12 calculation of the unfunded amount, so because of
13 those two uncertainties among others we don't know
14 what cuts, if any, there may need to be.

15 Q. Well, doesn't it say there must be significant cuts?
16 Am I -- are you saying that there's some -- that the
17 City's position may be that there are no cuts that are
18 necessary in accrued vested pension amounts?

19 MR. MILLER: Object to form.

20 A. We don't know. That's where we want to continue to
21 engage in discussions and negotiations with the
22 parties, but depending on what the unfunded amount is
23 and what assets may be available for those claims, it
24 certainly is possible.

25 Q. So maybe that should have been worded there may be



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1 State of Michigan)

2 County of Genesee)

3 Certificate of Notary Public

4 I certify that this transcript is a complete, true and
5 correct record of the testimony of the witness held in this
6 case.

7 I also certify that prior to taking this deposition,
8 the witness was duly sworn or affirmed to tell the truth.

9 I further certify that I am not a relative or an
10 employee of or an attorney for a party; and that I am not
11 financially interested, directly or indirectly, in the
12 matter.

13 WITNESS my hand this 20th day of September,
14 2013.

15
16
17 

18 Jeanette M. Fallon, CRR/RMR/CLR/CSR-3267

19 Certified Realtime Reporter

20 Registered Merit Reporter

21 Certified LiveNote Reporter

22 Certified Shorthand Reporter

23 Notary Public, Genesee, Michigan

24 Acting in Oakland County, Michigan

25 My Commission Expires: 9-19-18



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EXHIBIT G

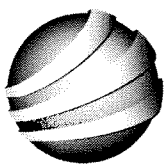
TO THE DECLARATION OF CLAUDE D. MONTGOMERY, ESQ.

In the Matter Of:
IN RE CITY OF DETROIT, MICHIGAN

13-53846

GLENN DAVID BOWEN

September 24, 2013



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Page

1 it was based upon a lower expectation of future
2 benefits, which generates a lower liability. And
3 then the cancellation of future COLAs generates
4 lower future benefit payments as well.

5 So in using information we were able to
6 draw from the valuation reports, we prepared
7 estimates of those two topics.

8 Q. Are these the estimates that you, in an
9 earlier document, called "guesses"?

10 A. I'm not sure which -- I mean, you can
11 put that particular document back in front of me.
12 I've used the phrase "rough guess"; I've used the
13 phrase "estimate" --

14 Q. Rough guess.

15 A. Rules of thumb, I would say, by
16 definition, are rough guesses. They're defined to
17 give us a proxy of what we -- the result we would
18 arrive at had we done more detailed modeling.

19 Q. And you have a workpaper showing this
20 calculation?

21 A. Yes. We would have developed two
22 calculations, one for the impact of the plan freeze



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Page

C E R T I F I C A T E

DISTRICT OF COLUMBIA:

I, Cindy L. Sebo, a Notary Public within
and for the Jurisdiction aforesaid, do hereby
certify that the foregoing deposition was taken
before me, pursuant to notice, at the time and place
indicated; that said deponent was by me duly sworn
to tell the truth, the whole truth, and nothing but
the truth; that the testimony of said deponent was
correctly recorded in machine shorthand by me and
thereafter transcribed under my supervision with
computer-aided transcription; that the deposition is
a true record of the testimony given by the witness;
and that I am neither of counsel nor kin to any
party in said action, nor interested in the outcome
thereof.



Cindy L. Sebo
District of Columbia, Notary Public
My Commission Expires
April 14, 2015

Cindy L. Sebo, RMR, CRR, RPR, CSR,
CCR, CLR, RSA, Notary Public



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EXHIBIT H
TO THE DECLARATION OF CLAUDE D. MONTGOMERY, ESQ.

In Re: City of Detroit, Debtor

*Treasurer Andrew Dillon
October 10, 2013*

*Moretti Group
471 W. South Street
Suite 41B
Kalamazoo, MI 49007
800-536-0804*



Original File 101013AD.TXT

Viewed - Script - with Word Index

<p style="text-align: right;">Page 65</p> <p>1 A. I don't agree with that.</p> <p>2 MS. NELSON: Objection; argumentative.</p> <p>3 BY MR. SHERWOOD:</p> <p>4 Q. And without giving your -- as a Treasurer, as a</p> <p>5 former Legislator, is it your view or do you agree</p> <p>6 that the proposed treatment on June 14th, 2013,</p> <p>7 providing for cuts in accrued vested pension amounts</p> <p>8 for both active and currently retired persons would</p> <p>9 be violative of Section 24 of the Michigan</p> <p>10 Constitution?</p> <p>11 A. No, because that doesn't provide for it. To my</p> <p>12 mind, and this is how this Governor does business,</p> <p>13 is he hires good people and lets them do their job.</p> <p>14 To me that document was laying out the</p> <p>15 facts for creditors so they could understand the</p> <p>16 financial condition of City.</p> <p>17 Q. So this wasn't a proposal even though it's -- even</p> <p>18 though the title of the document is proposal for</p> <p>19 creditors?</p> <p>20 A. I think he's just laying out the facts. This is the</p> <p>21 economic reality of the City of Detroit. From</p> <p>22 there, as you know, there was various meetings with</p> <p>23 various creditors to discuss can we get this thing</p> <p>24 settled out of court.</p> <p>25 Q. Did you participate in any of those meetings?</p>	<p style="text-align: right;">Page 67</p> <p>1 A. I was mostly just listening because I was getting an</p> <p>2 update about how things were going.</p> <p>3 Q. What was the -- what did he say?</p> <p>4 A. The only specific memory I have would be the one</p> <p>5 dealing with the SWOPS, discussions with the SWOP</p> <p>6 providers and whether or not there could be a</p> <p>7 settlement reached with them.</p> <p>8 Q. What did Mr. Orr say about the SWOPS?</p> <p>9 A. He reached an agreement with two of the SWOP</p> <p>10 providers that he could get a discount on the monies</p> <p>11 owed on the SWOPS, and that's my only memory of a</p> <p>12 specific -- I knew every week that he was meeting</p> <p>13 with various creditors, but that's the only one that</p> <p>14 I remember kind of a specific deliverable for.</p> <p>15 Q. And do you recall anything else about those</p> <p>16 nonprivileged conversations?</p> <p>17 Did he report that the negotiations were</p> <p>18 going well, that they were going poorly, that they</p> <p>19 were not going at all, anything along those lines or</p> <p>20 do you just recall the specific discussion about the</p> <p>21 SWOPS?</p> <p>22 A. Yeah. I -- there was, I think, just general</p> <p>23 comments that they weren't real productive, right,</p> <p>24 that we weren't making progress.</p> <p>25 Q. Did he say why?</p>
<p style="text-align: right;">Page 66</p> <p>1 A. I don't believe so.</p> <p>2 Q. Were you given reports by the emergency manager as</p> <p>3 to how those meetings were going?</p> <p>4 A. We typically had a weekly either meeting or call</p> <p>5 where we were given an update on the status of</p> <p>6 events.</p> <p>7 Q. Who was on the weekly meeting call?</p> <p>8 A. It would be Kevyn and some of the members from his</p> <p>9 team, various members of the Governor's office as</p> <p>10 well as my office.</p> <p>11 Q. And what was reported in terms of the progress that</p> <p>12 the emergency manager was or wasn't making with the</p> <p>13 out-of-court negotiations?</p> <p>14 MS. NELSON: I'm going to object to the</p> <p>15 extent that it calls for attorney-client</p> <p>16 communications and instruct him not to answer.</p> <p>17 That, in fact, is what it calls for.</p> <p>18 BY MR. SHERWOOD:</p> <p>19 Q. Did you have any communications with Mr. Orr outside</p> <p>20 the presence of counsel --</p> <p>21 A. Yes.</p> <p>22 Q. -- concerning -- concerning negotiations with</p> <p>23 creditors before the Chapter 9?</p> <p>24 A. Yes.</p> <p>25 Q. And what did you say during those communications?</p>	<p style="text-align: right;">Page 68</p> <p>1 A. I'm sure he did, but it would require going through</p> <p>2 each of the various creditors that he met with at</p> <p>3 the time so I don't have specific memories of each.</p> <p>4 The only one I have a specific memory right</p> <p>5 now about would be very difficult discussions with</p> <p>6 the sureties, the insurance companies, a lot of</p> <p>7 unwillingness to embrace what the economic realities</p> <p>8 were, and then a lot of concern about the number of</p> <p>9 retirees and the unions not wanting to represent the</p> <p>10 retirees, making it difficult to negotiate for</p> <p>11 20,000 people.</p> <p>12 Q. Did he say it was impossible to negotiate with all</p> <p>13 of the creditors of the City of Detroit? Did he</p> <p>14 reach that conclusion in your presence?</p> <p>15 A. I don't recall the specific words he used but</p> <p>16 clearly he was expressing that it was very difficult</p> <p>17 to work and negotiate with a pool of creditors that</p> <p>18 include 20,000 individuals, yes.</p> <p>19</p> <p>20 (Deposition Exhibit 5 was marked.)</p> <p>21</p> <p>22 BY MR. SHERWOOD:</p> <p>23 Q. Treasurer Dillon, we've marked as Dillon 5 an email</p> <p>24 from you dated July 9th to the Governor and others.</p> <p>25 Are you familiar with this email?</p>

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1 A. Yes.

2 Q. And it says that "Kevyn will meet with the Detroit
3 pensions tomorrow after all."

4 I want to ask you about the word after all.

5 Was there a suggestion before you wrote this email
6 that Kevyn was not going to meet with the Detroit
7 pensions?

8 A. Yeah. I think before that there was some thought
9 that that meeting was going to get cancelled.

10 Q. And who was going to cancel it?

11 A. My memory is Kevyn might have. There was a lawsuit
12 that was filed that I think caused some
13 consternation about whether or not he should meet
14 with them.

15 Q. So initially Mr. Orr was considering not meeting
16 with the pensions on July 10th, 2013, and then he
17 changed his mind and decided to meet with them?

18 A. My memory is there was a plan to meet with them,
19 then some lawsuits got filed which I think he
20 contemplated not going forward with the meeting.
21 And from reading this, apparently he went forward
22 with the meeting.

23 Q. Going down to the last paragraph it says "Tomorrow's
24 meeting could lead to questions directed to you
25 about your view on this topic."

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1 Obviously, you is the Governor, and the
2 Governor's view on this topic, I assume this topic
3 is the Detroit pensions. Would that -- is that
4 right? Am I right saying those things?

5 A. Right.

6 Q. So and then you -- then you say "...it's too
7 early in the process to respond to hypothetical
8 questions. We remain in many ways in the
9 informational stage."

10 Does that mean that at this point in time,
11 July 9th, 2013, you were still in the informational
12 stage vis-a-vis the Detroit pensions?

13 A. We were learning things. We were learning about an
14 annuity program that the City had offered employees.
15 We were learning that there was alternative
16 investments that were made that were not written
17 down. We were learning what assumptions the
18 City's actuarial firm was making versus the ones
19 that Milliman was hired to really appreciate and
20 understand what was the level of underfunding.

21 So on that date in question I couldn't tell
22 you that these funds were funded at X percent
23 because there was too many moving pieces to the
24 puzzle.

25 Q. So your advice to the Governor was in response to

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1 questions about his view on the Detroit pensions was
2 to just say it was too early in the process and you
3 were still in the informational stage; is that
4 right?

5 A. That's right.

6 Q. And this was before the Governor authorized
7 Chapter 9 filing, correct?

8 A. Correct.

9 Q. Did that -- did your view of the Governor's -- what
10 the Governor's position should be change before
11 July 18th, in the next week?

12 A. No.

13 MR. SHERWOOD: All right. I'm going to
14 stop here, Treasurer. Thank you.

15 I reserve the right if we have time to ask
16 a question or two later, but I think as a courtesy
17 to my -- the other lawyers here I'm going to turn
18 over the mic to them.

19 Thank you for your testimony this morning.
20 Should we take a quick break?

21 VIDEO TECHNICIAN: Off the record 11:02
22 a.m.

23 (A brief recess was taken.)

24 VIDEO TECHNICIAN: We're back on the record
25 at 11:06 a.m.

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1 EXAMINATION

2 BY MR. WERTHEIMER:

3 Q. Mr. Dillon, my name is Bill Wertheimer. We've met
4 off the record. I'm going to be asking you some
5 questions.

6 I represented and represent what we've
7 called the Flowers Plaintiffs. That is one of the
8 group of retirees that filed lawsuits in state court
9 before the bankruptcy was filed.

10 You indicated early in your testimony that
11 you were involved in some discussions shortly after
12 you took office as Treasurer about replacing Public
13 Act 72. Do you recall that?

14 A. Uh-huh. Yes.

15 Q. You need to say your answer.

16 A. Yes.

17 Q. And you talked about competing constitutional
18 provisions, one of them being the constitutional
19 provision relating to public health, safety,
20 welfare, correct?

21 A. Correct.

22 Q. And as I understand it, your focus at the time had
23 to do with your ability to modify CBAs; is that
24 right?

25 A. That's right.

<p style="text-align: right;">Page 93</p> <p>1 pension funds.</p> <p>2 Q. Okay. All right.</p> <p>3 Did you have any conversations with the</p> <p>4 Governor about the issue of whether Orr should file</p> <p>5 for bankruptcy say in the couple weeks preceding the</p> <p>6 filing?</p> <p>7 MS. NELSON: Again, are you speaking just</p> <p>8 one-on-one other than attorney-client?</p> <p>9 BY MR. WERTHEIMER:</p> <p>10 Q. One-on-one or in group conversations -- I don't</p> <p>11 want -- I'm not asking you to violate the</p> <p>12 attorney-client privilege. I think you understand</p> <p>13 what we're getting at here.</p> <p>14 A. Yeah.</p> <p>15 Q. So my questions you should assume are modified in</p> <p>16 that respect.</p> <p>17 A. Yeah, so can you restate the question?</p> <p>18 (Reporter read record as follows:</p> <p>19 "Q. Did you have any conversations with the</p> <p>20 Governor about the issue of whether Orr</p> <p>21 should file for bankruptcy say in the</p> <p>22 couple weeks preceding the filing?")</p> <p>23 THE WITNESS: I have a question for my</p> <p>24 lawyer.</p> <p>25 MR. WERTHEIMER: That's fine. If you want</p>	<p style="text-align: right;">Page 95</p> <p>1 you telling the Governor?</p> <p>2 That's -- your attorney's going to object.</p> <p>3 That was three questions.</p> <p>4 A. Okay.</p> <p>5 MS. NELSON: Yes, which one would you like</p> <p>6 him to answer first?</p> <p>7 MR. WERTHEIMER: He can do it in order or</p> <p>8 however he'd like.</p> <p>9 MS. NELSON: Well, I don't know that he's</p> <p>10 going to remember them all by the time he gets to</p> <p>11 the last one.</p> <p>12 THE WITNESS: I mean, to me the building</p> <p>13 block is what's the funded status. And that issue</p> <p>14 was fluid, and I think that's the first issue that</p> <p>15 if you're going to reach a settlement with your</p> <p>16 creditors it's important to understand, all right,</p> <p>17 what's the funding level. From there you can start</p> <p>18 to figure out how do you solve this equation going</p> <p>19 forward. So I was comfortable with that.</p> <p>20 BY MR. WERTHEIMER:</p> <p>21 Q. Well, isn't there a political reason to not</p> <p>22 translate it into the impact on retirees because the</p> <p>23 impact is going to be negative? All we need to do</p> <p>24 is look at the June 14th creditors' proposal to know</p> <p>25 that, don't we?</p>
<p style="text-align: right;">Page 94</p> <p>1 to take a break or just go outside.</p> <p>2 VIDEO TECHNICIAN: Off the record 11:35</p> <p>3 a.m.</p> <p>4 (A brief recess was taken.)</p> <p>5 VIDEO TECHNICIAN: We're back on the record</p> <p>6 at 11:37 a.m.</p> <p>7 THE WITNESS: Yeah, I don't recall any</p> <p>8 conversations with the Governor outside the presence</p> <p>9 of counsel on that topic.</p> <p>10 BY MR. WERTHEIMER:</p> <p>11 Q. Okay. If you take a look at the July 9 -- do you</p> <p>12 have that one in front -- that's five. This one</p> <p>13 here.</p> <p>14 A. Okay.</p> <p>15 Q. And let me direct your attention to the first</p> <p>16 paragraph. You're telling the Governor that the</p> <p>17 emergency manager's going to meet relative to the</p> <p>18 pensions the next day, and then a couple of</p> <p>19 sentences down you say he, meaning Orr, will not</p> <p>20 translate that into an impact on retirees or</p> <p>21 employees' vested rights or what share of monies</p> <p>22 available to unsecured creditors would go to the</p> <p>23 pension plans.</p> <p>24 What was your understanding of why Orr was</p> <p>25 not going to do that? What's the point, and why are</p>	<p style="text-align: right;">Page 96</p> <p>1 MS. NELSON: Objection; form, foundation,</p> <p>2 calls for speculation.</p> <p>3 BY MR. WERTHEIMER:</p> <p>4 Q. Go ahead.</p> <p>5 A. That wasn't my thinking. My thinking was until you</p> <p>6 really know the funding status, it's hard to really</p> <p>7 understand what the impact may be.</p> <p>8 So it was more important to understand that</p> <p>9 first.</p> <p>10 Q. Okay. I have nothing further. Thank you.</p> <p>11 MS. NELSON: Is everybody done?</p> <p>12 MR. SHERWOOD: I have one or two followup,</p> <p>13 but I'll let you go first.</p> <p>14 MS. GREEN: You can go. Do your followup</p> <p>15 first. We'll wait.</p> <p>16 MR. SHERWOOD: Can I use this microphone?</p> <p>17 MS. NELSON: Well, you're the Retiree</p> <p>18 Committee and I don't believe you --</p> <p>19 MR. GALLAGHER: We're not the Committee,</p> <p>20 we're the Retirement Systems.</p> <p>21 MS. NELSON: I'm sorry, the Retirement</p> <p>22 Systems. You did not subpoena -- did not issue a</p> <p>23 subpoena to the Treasurer, and it's my understanding</p> <p>24 the parties that didn't subpoena aren't entitled to</p> <p>25 question.</p>

<p style="text-align: right;">Page 117</p> <p>1 was provided to the media, and it states it's being 2 done solely off the record and it's critical this 3 information is not traced back to the Department 4 because it has not been finalized. 5 Is it the practice of the Treasury 6 Department to allow admittedly incomplete 7 information regarding the pensions to be leaked to 8 the media? 9 A. I would say it's unusual. 10 Q. Why would it be critical, as stated in the email, 11 for the Milliman summary that Mr. Stanton had asked 12 for to be deleted and not in connection to the 13 Treasury Department? 14 A. Does it say deleted in here? Oh, yeah. I see. 15 Okay. 16 I assume he didn't want to -- yeah, he 17 thought it was out there with other news media. 18 Rick Pluta must have been asking about it, so he 19 shared with him that which he thought other media 20 outlets probably already had. 21 Q. You mentioned that there was a cap for the fees that 22 the State would pay in connection with the 23 Chapter 9. Have we reached -- 24 A. Actually, you mischaracterized it. 25 Q. I'm sorry, what was your --</p>	<p style="text-align: right;">Page 119</p> <p>1 Q. The last question is relating to Exhibit 5 which has 2 already been marked. It's the July 9th email. 3 The email states "Tomorrow's meeting could 4 lead to questions directed to you about your view on 5 this topic." It's relating to the pension issue. 6 Is that a fair characterization of the 7 email? 8 A. Right. 9 Q. "In my view, it's too early in the process to 10 respond to hypothetical questions. We remain in 11 many ways in the informational stage. I have some 12 thoughts as to how you could address some pointed 13 questions if you're interesting in hearing them." 14 What pointed questions were you expecting? 15 A. Anything from -- well, going back in time here, but 16 just obviously the whole gamut of questions 17 regarding what the underfunding status could mean to 18 retirees, and I thought that the situation was not 19 understood enough for the Governor to go on record 20 yet because I couldn't even tell him with any degree 21 of confidence what level of funding these pension 22 funds had, so why should he get in the middle of a 23 debate about this. It's obviously a very charged 24 and sensitive issue, and it was my free political 25 comments to him.</p>
<p style="text-align: right;">Page 118</p> <p>1 A. We offered to pay 50 percent of consulting fees 2 prior to the filing. 3 Q. Up to five million? 4 A. Up to five million. 5 Q. And so in June of 2013 that would have been prior to 6 the filing and the State was still contributing to a 7 portion of those fees, correct? 8 A. I believe so. 9 Q. We can mark this as Exhibit 9. 10 11 (Deposition Exhibit 9 was marked.) 12 13 BY MS. GREEN: 14 Q. Do you recall sending this email? 15 A. I do. 16 Q. Is it safe to say the five million dollar cap has 17 been maxed out? 18 A. What I was reviewing was both the forecast as well 19 as the historical, so I was looking at more than 20 just the history. 21 Q. So what is the summary of fees that you were 22 referring to? 23 A. We were given an estimate of what the fees were 24 looking like and I reviewed it and wasn't very 25 happy.</p>	<p style="text-align: right;">Page 120</p> <p>1 Q. And this was really just over a week before the 2 filing. That was your stance? 3 A. Yeah. I don't -- yeah, obviously. But I don't -- I 4 think it was in the context of this meeting that 5 Kevyn was going to have with the committee that 6 drove this email. 7 Q. Did anything change between the ninth and the filing 8 on the 18th that changed your opinion regarding what 9 you, I believe, just stated was too early to tell 10 him with any degree of confidence what level of 11 funding the pension funds had I believe is what you 12 just stated. 13 A. Yeah, I have not -- my opinion is pretty much the 14 same. 15 Q. The last sentence of the email says "I have some 16 thoughts as to how you could address some pointed 17 questions if you're interesting in hearing them." 18 What were your ideas for how to answer the 19 questions? 20 A. I don't recall specifically at this point. 21 Q. Did you ever have a conversation with him regarding 22 your thoughts on how to answer the questions? 23 A. No. 24 Q. You mentioned in the email "Because pensions have 25 such a long life there are a lot of creative options</p>

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1 we can explore to address how they will be treated
2 in restructuring."
3 What were your creative options that you
4 had on the table?
5 A. There's dozens. I mean, I don't have one that I
6 would pick out. But pension funds do have a long
7 life and there's a lot of creative things that can
8 be done, so I -- I don't have one or two that I
9 would just throw out, but I do know that there's a
10 lot of ways to address that issue.
11 Q. Have there been any formal reports or proposals
12 identifying and explaining what you consider to be
13 these creative options?
14 A. No.
15 Q. Were these creative options ever explored with the
16 pension systems directly --
17 A. Not to my knowledge.
18 Q. -- to your knowledge?
19 I don't have any further questions.
20 MR. SHERWOOD: Anybody else have questions?
21 MR. WERTHEIMER: I do not.
22 RE-EXAMINATION
23 BY MR. SHERWOOD:
24 Q. I have one question about D-7, which I hadn't seen
25 before the deposition. It's an email to you from

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1 Heather Lennox.
2 I just want to know what your understanding
3 of the sentence "Many provisions in here are
4 designed to take advantage of PA 4 while it is still
5 in existence, but this also references other state
6 laws that would buttress the FCB and PCA powers..."
7 What is FCB -- what is your understanding
8 of what FCB and PCA powers, what that means?
9 A. FCB I don't know. She might be referring to
10 Financial Control Board, but as opposed to the FAB
11 I'm surmising.
12 PCA is not ringing a bell either.
13 Q. At this time there was a Financial Control Board in
14 existence, right?
15 A. No, I think that -- well, I think it was part of the
16 financial stability agreement, the creation of the
17 FAB, I think.
18 Q. And PCA, you don't know what that means?
19 A. I'm not recalling offhand, no.
20 Q. Was it -- did you express a desire to buttress the
21 powers of the Financial Control Board and insulate
22 those powers from attack in the event of a repeal?
23 A. Can you restate the question? I'm sorry.
24 Q. Was it -- were you interested at this point in time,
25 in March of 2012, to take steps to buttress the

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1 power of the Financial Control Board and insulate
2 those powers from being attacked in the event PA 4
3 was repealed?
4 A. I don't know if buttress is the right word. If
5 you're going to put in place all the structuring and
6 negotiate a consent agreement with the City, there's
7 other ways -- other legal basis to do that through
8 interlocal agreements. There's other laws that we
9 could look to that would give us the authority to
10 have this agreement have meaning to it.
11 So the thought was, you know, identify all
12 those legal arguments that would give legal standing
13 to the Financial Advisory Board and the consent
14 agreement is my memory.
15 MR. SHERWOOD: That's all.
16 MS. NELSON: All right, we're done. Thank
17 you.
18 THE WITNESS: Thank you.
19 VIDEO TECHNICIAN: Deposition has concluded
20 at 12:23 p.m.
21 (Deposition concluded at 12:23 p.m.)
22 - - -
23
24
25

Page 124

1 CERTIFICATE
2 STATE OF MICHIGAN)
3 COUNTY OF OAKLAND) SS:
4
5 I, LAUREL A. JACOBY, Certified Shorthand
6 reporter, a Notary Public, hereby certify that I recorded
7 in shorthand the examination of TREASURER ANDREW DILLON,
8 the deponent in the foregoing deposition; and that prior
9 to the taking of said deposition the deponent was first
10 duly sworn, and that the foregoing is a true, correct and
11 complete transcript of the testimony of said deponent.
12 I further certify that no request was made for
13 submission of the transcript to the deponent for reading
14 and signature and that no such submission was made.
15 I also certify that I am not a relative or
16 employee of a party or an attorney for a party; or
17 financially interested in the action.
18
19
20 LAUREL A. JACOBY, CSR-5059, RPR
21 Notary Public, Oakland County, Michigan
22 My commission expires: 9/1/18
23 Dated: This 13th day of October, 2013.
24
25

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

In re:)	Chapter 9
)	
CITY OF DETROIT, MICHIGAN,)	Case No. 13-53846
)	
)	Hon. Steven W. Rhodes
Debtor.)	
_____)	

**PRE-HEARING BRIEF OF THE DETROIT RETIREMENT SYSTEMS IN
SUPPORT OF THEIR ELIGIBILITY OBJECTIONS SPECIFICALLY
PURSUANT TO SECTIONS 109(c)(5) AND 921(c)
OF THE BANKRUPTCY CODE**

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The Police and Fire Retirement System of the City of Detroit (“PFRS”) and the General Retirement System of the City of Detroit (“GRS,” and together with PFRS, the “Retirement Systems”) submit the following as their pre-hearing brief in connection with the October 23, 2013 evidentiary hearing and in support of their objections¹ to the eligibility of the City of Detroit, Michigan (the “City”) to be a debtor under Chapter 9 of title 11 of the United States Code, 11 U.S.C. § 101, *et seq.* (the “Bankruptcy Code”), specifically pursuant to sections 109(c)(5) and 921(c) of the Bankruptcy Code.

Introduction

The City filed this Chapter 9 case mere weeks after presenting its Restructuring Proposal (defined below) to creditors, before it reasonably understood its own finances, including the value of its assets, anticipated cash flows, and the scope of its liabilities. The Restructuring Proposal treats the City’s legacy pension liabilities as unsecured debts, in violation of the Michigan Constitution, and does not propose any go-forward plan for the continuation or modification of the pension plans themselves. Abdicating its responsibilities to

¹ The Retirement Systems incorporate by reference and rely upon the facts and arguments set forth in the Objection of the Detroit Retirement Systems to the Eligibility Of the City of Detroit, Michigan to Be a Debtor Under Chapter 9 of the Bankruptcy Code [Dkt. No. 519] (the “Eligibility Objection”) and in the Reply in Support of Objection of the Detroit Retirement Systems to the Eligibility of the City of Detroit, Michigan to Be a Debtor Under Chapter 9 of the Bankruptcy Code [Dkt. No. 1166].

negotiate with its creditors, the City instead filed Chapter 9 to improperly evade the restrictions on the diminishment or impairment of accrued financial benefits imposed by the Pensions Clause (defined below), and to gain leverage over creditors through the Chapter 9 process. At the evidentiary hearing on the section 109(c)(5) and 921(c) issues, the Retirement Systems will demonstrate that: (i) the City failed to negotiate in good faith with its creditors; (ii) negotiations were not impracticable; and (iii) the petition was not filed in good faith. As a result, the petition must be dismissed.

Factual Background²

I. The Retirement Systems

The residents of the City established the Retirement Systems through amendments to the City's Charter of 1918 (effective July 1, 1938, and effective

² On October 8, 2013, after reviewing requests from the UAW and the Retirement Systems, the City produced documents that it had previously claimed as privileged. Upon becoming aware that the Retirement Systems intended to use these documents as exhibits at the evidentiary hearing, the City reasserted the attorney-client privilege with respect to certain of the documents that it had produced. The Retirement Systems had intended to rely upon the documents at issue in support of its arguments that the City did not negotiate with its creditors in good faith as required by Bankruptcy Code section 109(c)(5) and that the City did not file the petition in good faith as required by Bankruptcy Code section 921(c). Although the Retirement Systems have attempted to resolve this issue through discussions with the City, it has not been able to do so as of the filing of this brief. Therefore, the Retirement Systems reserve the right to supplement this brief to include the additional facts learned during discovery and to supplement its legal arguments accordingly.

July 1, 1941, respectively) as authorized by Article VII, section 22 of the Michigan Constitution and sections 4i, 4j, and 21 of the Home Rule City Act, 1909 PA 267 (as amended), M.C.L. § 117.1 *et seq.* Among other things, the Retirement Systems: (i) administer retirement, disability, and survivor benefits to eligible uniformed and non-uniformed City employees and their beneficiaries (*i.e.*, the participants); (ii) ensure that the City actually honors its collective bargaining agreements by tendering to the Retirement Systems the City's annual and obligatory pension contributions; and (iii) protect the vested pension benefits (*i.e.*, "accrued financial benefits") of the Retirement Systems and their participants. There are more than 32,000 active and retired employees of the City, who are participants in the Retirement Systems and whose "accrued financial benefits" the Retirement Systems must protect.

II. The Michigan Constitution

To ensure protection of public pension benefits, the Michigan Constitution states: "The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby." MICH. CONST., art. IX, § 24. Article IX, §24 of the Michigan Constitution is referred to as the "Pensions Clause" herein.

III. The Emergency Manager and the Restructuring Proposal

On March 14, 2013, Kevyn D. Orr was appointed as the emergency financial manager of the City pursuant to Public Act 72 of 1990, the Local Government Fiscal Responsibility Act, M.C.L. §141.1201, *et seq.* On March 28, 2013, upon the effectiveness of Public Act 436, the Local Financial Stability and Choice Act, M.C.L. §141.1541, *et seq.* (“PA 436”), Mr. Orr became, and continues to act as, the emergency manager with respect to the City (the “Emergency Manager”).

On March 14, 2013, as mandated by Article XI, section 1 of the Michigan Constitution and section 1 of the Constitutional Oath of Office Act, 1951 PA 22, M.C.L. § 15.151 *et seq.*, (“PA 22”), the Emergency Manager swore the following oath, which was later filed with the Michigan Secretary of State: “*I do solemnly swear that I will support the Constitution of the United States and the Constitution of this State, and that I will faithfully discharge the duties of the office of Emergency Financial Manager – City of Detroit according to the best of my ability.*”

In a June 13, 2013 interview with The Detroit Free Press, the Emergency Manager addressed the protection under the Pensions Clause against the impairment of accrued public pension benefits, expressing his intention to evade

this provision of the Michigan Constitution through a federal Chapter 9 bankruptcy proceeding:³

Q: You said in this report that you don't believe there is an obligation under our state constitution to pay pensions if the city can't afford it?

A: The reason we said it that way is to quantify the bankruptcy question. We think federal supremacy trumps state law.

Q: Which the 9th Circuit agrees for now.

A: It is what it is—so we said that in a soft way of saying, “Don’t make us go into bankruptcy.” **If you think your state-vested pension rights, either as an employee or retiree—that’s not going to protect you. If we don’t reach an agreement one way or the other, we feel fairly confident that the state federal law, federalism, will trump state law** or negotiate. The irony of the situation is we might reach a deal with creditors quicker because employees and retirees think there is some benefit and that might force our hand. That might force a bankruptcy.

On June 14, 2013, the Emergency Manager issued his Proposal for Creditors (the “Restructuring Proposal”) wherein he took the position that: (i) pension debts are unsecured claims that may be, and must be, impaired in any prospective Chapter 9 bankruptcy proceeding; and (ii) the City’s alleged approximate \$3.5 billion underfunding liability would be placed in a pool of unsecured claims

³ See *Q & A with Kevyn Orr: Detroit’s Emergency Manager Talks About City’s Future*, Detroit Free Press (June 16, 2013), available at <http://www.freep.com/article/20130616/OPINION05/306160052/kevyn-orr-detroit-emergency-manager-creditors-fiscal-crisis>.

comprising approximately \$11.5 billion in claims, and exchanged for a *pro rata* share of an unsecured note in the face amount of \$2.0 billion. The Restructuring Proposal is attached as Exhibit A to the Declaration of Kevyn D. Orr in Support of City of Detroit, Michigan's Statement of Qualifications Pursuant to Section 109(c) of the Bankruptcy Code. [Dkt. No. 11] (the "Orr Declaration").

IV. Pre-Petition Meetings Attended by the Retirement Systems

On June 14, 2013, a meeting occurred at which the Emergency Manager and the City's advisors presented the Restructuring Proposal to many representatives of the City's creditors. Representatives for the Retirement Systems were in attendance at the June 14, 2013 presentation. The meeting was an informational presentation, with no negotiations.

On the morning of June 20, 2013, a meeting occurred that was attended by certain of the City's advisors and representatives from the City's unions and retiree associations, representing the City's non-uniformed employees and retirees, relating to health and pension obligations. Advisors from the GRS attended this meeting. The meeting was informational, and negotiations did not occur.

In the afternoon of June 20, 2013, a meeting occurred that was attended by certain of the City's advisors and representatives from the City's unions and retiree associations, representing the City's uniformed employee and retirees, relating to

retiree health and pension obligations. Advisors from the PFRS attended this meeting. The meeting was informational, and negotiations did not occur.

On or about June 20, 2013, access was first granted to the Retirement Systems' professionals to the City's electronic data room. That data room had a limited population of documents, which was supplemented over ensuing periods of time.

On June 25, 2013, a meeting occurred that was attended by certain of the City's advisors and representatives and advisors from the City's bond insurers and U.S. Bank, the trustee or paying agent on all of the City's bond issuances, to review various financial information. The Retirement Systems financial advisors attended this meeting. The meeting was informational, and negotiations did not occur.

On July 9, 2013 and July 10, 2013, representatives of the Retirement Systems attended the diligence sessions regarding the City's finances that were held at The Cadillac Place in Detroit, Michigan (the "July Diligence Sessions"). The July Diligence Sessions were attended by, among other persons, representatives of and advisors to the Emergency Manager, the City, and various creditors of the City. The July Diligence Sessions were informational, and negotiations did not occur.

V. The Authorization and Filing of the Chapter 9 Bankruptcy Petition

On July 16, 2013, upon information and belief, the Emergency Manager delivered a letter to the Governor and the State Treasurer recommending, pursuant to section 18(1) of PA 436, that the City be authorized to file a case under Chapter 9 of the Bankruptcy Code (the “Bankruptcy Recommendation”). The Bankruptcy Recommendation is attached as Exhibit J to the Orr Declaration. In the Bankruptcy Recommendation, the Emergency Manager states that “[t]he City’s debt and legacy liabilities must be significantly reduced” and that, in recommending a Chapter 9 bankruptcy, “the negotiation of changes to pension and retiree benefits with the City’s retiree constituency is impracticable without court intervention.” Bankruptcy Recommendation at pp. 2, 8. Based on the foregoing and many other excerpts from the Bankruptcy Recommendation, it is clear that the Emergency Manager contemplated use of the Chapter 9 process to implement his Restructuring Proposal, including the impairment and diminishment of “legacy” accrued pension benefits.

On July 18, 2013, the Governor sent a letter to the Emergency Manager and the State Treasurer purporting to grant to the Emergency Manager authorization to place the City into Chapter 9 bankruptcy (the “Governor’s Authorization”). The Governor’s Authorization is attached as Exhibit K to the Orr Declaration. The Governor expressly recognized that section 18(1) of PA 436 authorized him to

place “contingencies” on a bankruptcy filing, but he nevertheless declined to do so. *Id.* at p. 4. Citing section 943(b)(4) of the Bankruptcy Code, the Governor concluded: “Federal law already contains the most important contingency—a requirement that the plan be legally executable.” *Id.*

On July 18, 2013 (the “Petition Date”), the City filed its Voluntary Petition under Chapter 9 of the Bankruptcy Code (the “Bankruptcy Petition”) and also filed the City Eligibility Submissions.⁴

VI. The City’s and the Governor’s Admissions

In the City of Detroit, Michigan’s Objections and Responses to Detroit Retirement Systems’ First Requests for Admission Directed to the City of Detroit, Michigan [Dkt. No. 849] (the “City’s Responses to Requests for Admissions”):

- “The City admits that the Restructuring Proposal contemplates a reduction in Accrued Financial Benefits to participants of the Retirement Systems, but seeks agreement and acceptance by plan beneficiaries.” City’s Responses to Requests for Admissions, Response No. 5.
- “The City admits that the Bankruptcy Recommendation contemplates a reduction in Accrued Financial Benefits

⁴ The Statement of Qualifications Pursuant to Section 109(c) of the Bankruptcy Code [Dkt. No. 10] (the “Statement of Qualifications”), the Orr Declaration, the Declaration of Gaurav Malhotra in Support of Statement of Qualifications [Dkt. No. 12] (the “Malhotra Declaration”), the Declaration of Charles M. Moore in Support of Statement of Qualifications [Dkt. No. 13] (the “Moore Declaration”), and the Memorandum in Support of Statement of Qualifications [Dkt. No. 14] (the “Eligibility Memorandum”) are collectively referred to herein as the “City Eligibility Submissions.”

to participants of the Retirement Systems, but seeks agreement and acceptance by plan beneficiaries.” *Id.* at Response No. 6.

- The City admits that the Governor’s Authorization adopts the Bankruptcy Recommendation without modification. *Id.* at Response No. 7.
- The City admits that the Governor’s Authorization enables the City to seek to diminish or impair Accrued Financial Benefits through this Chapter 9 Case. *Id.* at Response No. 11.
- The City admits that it intends to seek to diminish or impair the Accrued Financial Benefits of the participants in the Retirement Systems through this Chapter 9 Case. *Id.* at Response No. 12.

Likewise, the Governor admitted that at the time he authorized the bankruptcy, he knew that “[b]ased on the facts going into it” there was a “likelihood” accrued pension benefits would be reduced in the Chapter 9 case. (Ex. A, Snyder Dep. 10/9/2013, pp. 66-67).

Argument

I. THE CITY CANNOT MEET ITS BURDEN OF PROOF UNDER SECTION 109(C)(5)(B) OF THE BANKRUPTCY CODE BECAUSE IT FAILED TO NEGOTIATE IN GOOD FAITH WITH ITS CREDITORS.

A. Standard of Review

The City may be a debtor under Chapter 9 of the Bankruptcy Code if, and only if, it:

- (1) is a municipality;

- (2) is specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State Law to authorize such entity to be a debtor under such chapter;
- (3) is insolvent;
- (4) desires to effect a plan to adjust such debts; and
- (5) (A) has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;
- (B) has negotiated in good faith with creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;
- (C) is unable to negotiate with creditors because such negotiation is impracticable; or
- (D) reasonably believes that a creditor may attempt to obtain a transfer that is avoidable under section 547 of this title.

11 U.S.C. § 109(c)(1-5). The burden rests with the debtor to establish by a preponderance of the evidence that the requirements of Bankruptcy Code section 109(c) have been met. *In re City of Stockton*, 475 B.R. 720, 725 (Bankr. E.D. Cal. 2012 (internal citations omitted)) (“The burden of proof, at least as to the five § 109(c) elements, is on the municipality as the proponent of voluntary relief. . . . The quantum of proof . . . is the familiar preponderance-of-evidence standard of

basic civil litigation.”); *In re City of Harrisburg*, 465 B.R. 744, 752 (Bankr. M.D. Pa. 2011) (citations omitted) (“The burden of establishing eligibility is on the debtor.”).

Further, Section 921(c) of the Bankruptcy Code provides that “[a]fter any objection to the petition, the court, after notice and a hearing, may dismiss the petition if the debtor did not file the petition in good faith or if the petition does not meet the requirements of [the Bankruptcy Code].” 11 U.S.C. § 921(c). Courts have ruled that after an objection to the petition, the bankruptcy court must dismiss the case if the petition does not meet the requirements of the Bankruptcy Code, notwithstanding the seemingly permissive language of section 921(c). *See, e.g., In re New York City Off-Track Betting Corporation*, 427 B.R. 256, 264 (Bankr. S.D.N.Y. 2010) (“Courts must dismiss the petitions of debtors filing under chapter 9 who fail to satisfy [the] requirements [of section 109(c)].”), citing *Int’l Ass’n of Firefighters, Local 1186 v. City of Vallejo (In re City of Vallejo)*, 408 B.R. 280, 289 (9th Cir. B.A.P. 2009); *In re Suffolk Regional Off-Track Betting Corp.*, 462 B.R. 397, 421 (Bankr. E.D.N.Y. 2011) (citation omitted) (“Despite the permissive statutory language, courts have construed § 921(c) to require the mandatory dismissal of a petition filed by a debtor who fails to meet the eligibility requirements under §109(c).”).

B. The City Did Not Negotiate with the Retirement Systems

1. Meetings attended by representatives of the Retirement Systems were informational only.

In the weeks prior to the Petition Date, the Retirement Systems, its counsel and advisors, attended the informational presentations on June 14, June 20, June 25, July 10, and July 11, 2013. At the evidentiary hearing, Bradley A. Robins and Eric Mendelsohn, both of Greenhill & Co., LLC, the Retirement Systems' restructuring advisor with respect to the City's finances, will testify that these sessions were primarily presentational and informational, with multiple parties in attendance, and that no negotiations occurred during those sessions.

Although the City suggests that the informational presentations made to various creditors regarding its Restructuring Proposal satisfied its obligation to negotiate under section 109(c)(5)(B), in reality, no negotiations ever took place between the City and the Retirement Systems regarding the City's financial restructuring. With respect to the June 14, 2013 presentation, the Emergency Manager admits that negotiations did not occur. *See* Ex. B, Orr Dep, at 129:14-18 ("Q: There were no actual negotiations at that [June 14, 2013] meeting; were they? A: I don't think that—you know, be careful of the word negotiations, but no, not as it's generally understood.").

The extent to which a debtor must, prior to bankruptcy, engage in good-faith negotiations with creditors is subject to judicial review based on the facts of each

case. *Compare In re Ellicott Sch. Bldg. Auth.*, 150 B.R. 261, 266 (Bankr. D. Colo. 1992) (debtor did not negotiate in good faith where it indicated that the economic terms of its proposed plan were nonnegotiable), *with In re Villages at Castle Rock Metro. Dist. No. 4*, 145 B.R. 76, 84-86 (Bankr. D. Colo. 1990) (debtor's meetings with institutional bondholders to develop a financial model and to reach a conceptual agreement held to be sufficient). *See also In re Cottonwood Water & Sanitation Dist.*, 138 B.R. 973, 979 (Bankr. D. Colo. 1992) (requiring an evidentiary hearing on the scope of prepetition negotiations).

From the outset, it was made clear that the terms of the Restructuring Proposal were not negotiable. The Emergency Manager admitted: "The public can comment [on the City's proposed restructuring plan], but. . . it is my plan and it's within my discretion and obligation to do it. This is isn't a plebiscite, ***we are not, like, negotiating the terms of the plan.***"⁵

It is evident from the City's actions that it had no intention of truly negotiating with its creditors. Indeed, the evidence will show that at least as early as July 1, 2013, the City had determined that its chapter 9 petition would be filed on July 19, 2013. Therefore, chapter 9 was already an inevitability by the time the City met with creditors on July 10 and 11, 2013.

⁵ Orr Interview to Detroit WWJ Newsradio 950/AP, Detroit EM Releases Financial Plan; City Exceeding Budget By \$100M Annually, May 12, 2103, available at <http://detroit.cbslocal.com/2103/05/12/kevin-orr-releases-finanical-plan-for-city-of-detroit/>.

The Retirement Systems submit that one of the primary purposes of requiring good faith negotiations with creditors prior to filing a petition under chapter 9 is to ensure that the entity seeking chapter 9 protection has sufficiently considered its alternatives to bankruptcy before filing. *See In re New York City Off-Track Betting Corp.*, 2010 Bankr. LEXIS 791, at *64-65 (Bankr. S.D.N.Y. Mar. 22, 2010) (suggesting that alternatives to bankruptcy must be considered to file a chapter 9 petition in good faith under section 921(c)). Here, the City arrived at the decision to file a petition under chapter 9 before its discussions with creditors had hardly begun, which indicates that the City engaged in these discussions merely as a “check the box” exercise as a means of establishing the record for eligibility under section 109(c)(5)(B) of the Bankruptcy Code, rather than to earnestly attempt to avoid bankruptcy by negotiating a consensual deal with creditors.

Indeed, with respect to negotiating with creditors, it is clear that the City’s ultimate intent was not to strike a deal with creditors which could have avoided the necessity of a chapter 9 petition, but rather to negotiate *inside* the bankruptcy proceeding so that it would have the leverage provided to it by the provisions of the Bankruptcy Code. Filing a petition for such purposes is not within the spirit of chapter 9 and should not be considered “good faith” sufficient to satisfy sections 109(c)(5)(B) or 921(c). As explained by the court in *In re Cottonwood Water*:

In general, the Bankruptcy Code, as remedial legislation, should be broadly construed in order to provide the intended relief. However, municipal bankruptcies involve significant problems which are not encountered in the private sector. Important constitutional issues arise when a municipality enters the bankruptcy arena. Recognizing these problems, Congress consciously sought “to limit accessibility to the bankruptcy court” by municipalities. H.R. Conference Report, 94-938, p. 10. One way to do so was to require the municipal entity, before rushing to this Court, to first seek to negotiate in good faith concerning the treatment the creditors may be expected to receive under a plan to be filed under section 941 of the Code. The conditioned entry to this Court which is afforded by section 109(c) recognizes that *the negotiating posture of the parties changes once the bankruptcy petition is filed. . . . The “creditor protection” provided by section 109(c)(5), as interpreted by this Court, insures that the creditors have an opportunity to negotiate concerning a plan on a level playing field with the debtor before their rights are further impaired by the provisions of section 362 of the Code.*”

In re Cottonwood Water & Sanitation Dist., 138 B.R. 973, 979 (Bankr. D. Colo. 1992) (emphasis added). In this case, the City made no real effort to negotiate prior to filing its petition. Instead, the Emergency Manager followed the model set forth in the Jones Day pitch presentation to the City. That pitch presentation encouraged negotiations in the shadow of chapter 9 because it “Creates Leverage in Creditor Negotiations.” *See Ex. C, Jones Day Presentation to the City of Detroit*, p. 17.

The Bankruptcy Code requires that good faith negotiations occur *before* filing. In *In re Ellicott School Building Authority*, 150 B.R. at 266, court held that good faith negotiations had not taken place when the debtor held three public

meetings with its creditors regarding its restructuring plan but informed the creditors at those meetings that the substantive terms of the plan were non-negotiable. *In re Ellicott School Building Authority*, 150 B.R. at 266. The court found it “difficult to imagine that any true negotiations [could] take place in an environment where the substantive terms of a proposal were not open to discussion.” *Id.* Similarly, the City held several informational meetings regarding its Restructuring Proposal, but the evidence will show that the City’s representatives made several statements to creditors that the discussions involving the Restructuring Proposal were not negotiations. Ultimately, the evidence will show that the City determined that it would file its petition before two of the meetings even took place. Both the Restructuring Proposal and the restructuring plan presented to creditors in the *Ellicott* case were presented with a “take it or leave it” approach, and, like in *Ellicott*, this Court should reject the notion that the City negotiated in good faith with its creditors.

II. Negotiations With Its Creditors Were Not Impracticable Per Section 109(c)(5)(C) of the Bankruptcy Code.

Absent good faith negotiations with its creditors, the City must demonstrate that negotiations were impracticable under section 109(c)(5)(C) to be eligible to be a debtor under chapter 9, which it cannot do. *See In re Pierce County Housing Authority*, 414 B.R. 702, 713 (Bankr. W.D. Wash. 2009). While the City suggests that its large number of creditors rendered negotiations “impracticable” under

section 109(c)(5)(B), the fact that the City may have certain creditors with whom they were not able to negotiate does not remove the City from the obligation under the statute to negotiate with those creditors who are able to organize themselves and negotiate with the City. *See In re Villages at Castle Rock Metro. Dist. No. 4*, 145 B.R. 76, 85 (Bankr. D. Colo. 1990).

Moreover, the number of a municipality's creditors alone does not, and should not, automatically render negotiations with creditors impracticable. If that were the case, every municipality with more than a handful of creditors would be able to prove the impracticability of negotiations without any evidence other than the number of creditors identified on the list of creditors. Here, multiple unions and retiree associations exist which could have and were willing to engage in negotiations with the City on behalf of their members. That the City failed and refused to negotiate with any of them, as alleged in declarations filed by other objecting parties, does not evidence impracticability of negotiations.

III. The City Did Not File The Petition In Good Faith And It Must Be Dismissed Under Section 921(c) of the Bankruptcy Code.

Under section 921(c), the court may dismiss the petition if the debtor did not file it in good faith. 11 U.S.C. § 921(c). "Good faith is not defined in the Code." *In re McCurtain Mun. Auth.*, 2007 Bankr. LEXIS 4160, *10 (Bankr. E.D. Okla. Dec. 4, 2007). The "primary function of the good faith requirement has always been to ensure the integrity of the reorganization process by limiting access to its

protection to those situations for which it was intended.” *In re Sullivan County Regional Refuse Disposal Dist.*, 165 B.R. 60, 80 (Bankr. D.N.H. 1994). Courts have found the bad faith standard applied in Chapter 11 cases equally applicable to Chapter 9 cases. *In re McCurtain*, 2007 Bankr. LEXIS 4160, *10 (Bankr. E.D. Okla. Dec. 4, 2007); *In re Villages at Castle Rock Metropolitan Dist. No. 4*, 145 B.R. 76, 81 (Bankr. D. Colo. 1990) (citations omitted) (internal citation omitted). As one court explained:

In the Chapter 11 context, “good faith” has been described as a requirement which prevents abuse of the bankruptcy process by debtors whose overriding motive is to delay creditors without benefitting them in any way or to achieve reprehensible purposes. Determining whether a petition has been filed in good faith requires an evaluation of a debtor’s financial condition, motives, and the local financial realities. These comments would appear to be equally applicable, at least in part, to a Chapter 9 petition.

In re Villages at Castle Rock Metropolitan Dist. No. 4, 145 B.R. 76, 81 (Bankr. D. Colo. 1990) (citations omitted). Other relevant considerations regarding good faith under Chapter 9 include “whether the City’s financial problems are of a nature contemplated by chapter 9, whether the reasons for filing are consistent with chapter 9, the extent of the City’s pre-petition efforts to address the issues, the extent that alternatives to chapter 9 were considered, and whether the City’s residents would be prejudiced by denying chapter 9 relief.” *In re City of Stockton*, 493 B.R. 772, 794 (2013). The evidence needs to demonstrate that the “purpose of

the filing of the chapter 9 petition not simply be to evidence needs to buy time or evade creditors.” *In re City of Vallejo*, 408, B.R. 280, 295 (2009).

A. The Petition Was Not Filed In Good Faith Because It Was Filed With The Intention of Impairing Accrued Financial Benefits In Violation Of The Pensions Clause.

As discussed above, and as admitted by the City, the City intends to seek to diminish or impair the accrued pension benefits of the participants in the Retirement Systems through this Chapter 9 Case. *See* City’s Responses to Requests for Admissions, at Response No. 12. Because the City seeks to impair vested pension benefits in violation of the Pensions Clause, and to evade paying its pension obligations, the filing is in bad faith under 921(c).

B. Material Financial Information Required For Good Faith Negotiations Was Not Complete Pre-petition.

Prior to the Petition Date, the City did not have the requisite financial information necessary to reasonably assess whether a Chapter 9 was necessary to restructure its debts. As of the Petition Date, the City did not have a complete understanding of the value of its assets, the income that could be generated from the monetization of its assets, its projected cash flows, or the scope of its liabilities. Notwithstanding these financial uncertainties, and the resulting inability to assess out-of-court restructuring options, the City filed the petition in the hopes of gaining leverage in negotiations with its creditors. As such, the petition was not filed in

good faith.

In fact, the information needed for such discussions is still not complete. Charles M. Moore, a senior managing director at Conway MacKenzie, Inc., the City's operational restructuring advisor, testified:

Q. Has there been a specification of those levels of cuts [in accrued vested pension amounts] that must occur?

Mr. Miller: Object to form.

Q. I mean, have you put a dollar amount on it?

A. No, and our analysis of this continues. Right now we still don't know what assets could be available to put towards the pensions. We still have not had the type of dialogue that we would like to have related to the calculation of the underfunded amount, so because of those two uncertainties among others, we don't know what cuts, if any, there may need to be.

Q. Well, doesn't it say there must be significant cuts? Am I - - are you saying that there's some - - that the City's position may be that there are no cuts that are necessary in accrued vested pension amounts?

Mr. Miller: Object to form.

A. We don't know. That's where we want to continue to engage in discussions and negotiations with the parties, but depending on what the unfunded amount is and what assets may be available for those claims, it certainly is possible.

Ex. D, Moore Dep 9/18/2013, p. 151: 4-24. In addition, as of the petition date, and

still to date, the City does not know the value derivable from two of its primary assets: the Water and Sewerage Department (and its potential disposition into a Water Authority) and the City-owned art work at the Detroit Institute of Arts. Because the City does not yet know what assets are available to satisfy liabilities and does not know the scope of its liabilities, the Chapter 9 filing was premature and not in good faith.

Conclusion

For the reasons set forth herein and in the Eligibility Objection, the petition should be dismissed.

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Dated: October 17, 2013

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**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

In re:

CITY OF DETROIT, MICHIGAN,

Debtor.

)
) Chapter 9
)
) Case No. 13-53846
)
) Hon. Steven W. Rhodes
)

AFSCME'S SUPPLEMENTAL BRIEF REGARDING ELIGIBILITY

Pursuant to this Court's Order Regarding Further Briefing On Eligibility [Docket No. 1217], AFSCME submits this supplemental brief. The guiding principle of AFSCME's arguments is: whether the state constitution by PA 436 or the federal constitution by chapter 9, legislation cannot rewrite or violate a constitution. The City fails to meet the eligibility requirements because this chapter 9 filing violates both the state and federal constitutions generally and as applied in this case, including by seeking to impair or diminish vested pension benefits. This Court should not allow the challenges facing a distressed municipality, however daunting, to be solved by violating fundamentally protected constitutional rights.¹

I. STATE CONSTITUTIONAL PENSION RIGHTS ARE NON-DISCHARGEABLE RIGHTS NOT PRE-EMPTED BY THE CODE

Because the Pensions Clause creates a constitutional right, not a statutory priority, chapter 9 does not preempt it. Instead, this constitutional right renders the City's accrued pension obligations non-dischargeable. Even where a state law not enshrined in a state constitution advances "an essential state interest," the Bankruptcy Code "must be clear and manifest" if it is "[t]o displace" the state law. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 545 (1994). "[W]here the intent to override" state law "is doubtful, our federal system demands deference to long-established traditions of state regulation." *Id.* at 546.

First, no provision in chapter 9 preempts state constitutional rights, let alone the right to accrued public pensions, which have long been subject to state regulation. To the contrary, chapter 9 explicitly protects state law. *See, e.g.*, 11 U.S.C. §§ 109(c)(2), 903, and 943(b)(4). Most important, a chapter 9 bankruptcy is impossible without state consent. As a result, chapter

¹ The City's attempt to use chapter 9 to sidestep the Michigan and U.S. Constitutions was outlined in counsel for the City's journal article for using chapter 9 as a "toolbox that is unavailable outside of bankruptcy" for "compromising a municipality's pension debt" and as a mechanism to "generate leverage for the municipality and pave the way for consensual modifications to its pension obligations." Jeffrey B. Ellman & Daniel J. Merrett, *Pensions and Chapter 9: Can Municipalities Use Bankruptcy to Solve Their Pension Woes?*, 27 Emory Bankr. Dev. J. 365, 383-84 (2011).

9 *cannot* preempt state constitutional rights where, as here, that consent is given by state statute. For even assuming *arguendo* that “a state’s authorization . . . is a declaration of state policy that the benefits of Chapter 9 take precedence over control of its municipalities” and that therefore state *statutes* conflicting with chapter 9 are made inapposite once a state authorizes a municipal bankruptcy, *In re City of Vallejo*, 432 B.R. 262, 268 (E.D. Cal. 2010), state legislatures lack the power to declare *by statute* that state policy takes precedence over the higher authority of the state *constitution*. Rather than preempt state constitutional rights, chapter 9 *requires* that state constitutional rights be honored at the outset as a condition of authorization under Section 109(c)(2), as a mechanism of state control under Section 903, and as a limit on the terms of the plan under Section 943(b)(4).

For this reason, *Matter of Sanitary & Imp. Dist. No. 7*, 98 B.R. 970 (Bankr. D. Neb. 1989), does not support the proposition that the City can impair its constitutional pension obligations through chapter 9. The issue there was whether Nebraska statutes, not the Nebraska *constitution*, which “grant a priority of payment in favor of bonds over warrants” applied in chapter 9. 98 B.R. at 973. The bankruptcy was authorized by a state statute. *See id.* at 971 (citing Neb. Rev. Stat. Section 77–2419). The court’s holding that state priorities could be overcome in bankruptcy merely allowed the state authorization *statute* to trump the state priority *statute*. State statutes routinely trump one another, and state legislatures are free to rewrite their own statutes as a matter of legislative prerogative. But a state legislature cannot, by merely passing a statute, rewrite the state constitution. Likewise, the Michigan legislature cannot authorize municipal bankruptcy by passing PA 436 and thereby rewrite the Pensions Clause, let alone write the Pension Clause out of the Michigan Constitution.

Second, the Supreme Court clearly instructed that “the federal bankruptcy court should

take whatever steps are necessary to ensure that” a creditor is “afforded in federal bankruptcy court the same protection he would have under state law if no bankruptcy had ensued.” *Butner v. United States*, 440 U.S. 48, 56 (1979). Under Michigan law, an AFSCME retiree’s *constitutional right*, as distinct from a statutory priority, provides that accrued pension “shall not be diminished or impaired,” “shall be funded during” the year in which they “arise,” and “shall not be used for financing unfunded accrued liabilities.” The Constitution thus provides not a mine-run contract right, but an absolute guarantee of non-reduction and affirmative funding. *See* AFSCME Am. Elig. Obj. ¶¶ 119-20, 138-43. *Butner* further holds that the Code should not “afford . . . rights that are not” available “as a matter of state law.” *Id.* Allowing pension rights expressly protected from reduction or non-funding to be discharged as unsecured claims would operate to convert a constitutional right to a claim on par with other unsecured creditors, thereby creating a right of equal treatment for other non-pension creditors they would not have outside of bankruptcy because the Pensions Clause is stronger than the Contracts Clause. *See* AFSCME Am. Elig. Obj. ¶¶ 138-43. This result would violate the Code by allowing other non-pension creditors to receive “a windfall merely by reason of the happenstance of bankruptcy.” *Id.* at 55.

Third, not only should the rights created by the Pensions Clause survive bankruptcy under *Butner* because they are constitutional rights rather than statutory priorities, but separately, the Pensions Clause is an exercise of the right to enact “state or local laws designed to protect public health or safety” which cannot be disregarded by the debtor. *Midlantic Nat’l Bank v. New Jersey Dep’t of Env. Protection*, 474 U.S. 494, 502 (1986). In *Midlantic*, the Supreme Court held that a bankruptcy trustee’s power to abandon property of the estate under chapter 11 did not include the power to violate state or local environmental protection laws because “the efforts of the trustee to marshal and distribute the assets of the estate must yield to the *governmental*

interest in public health and safety.” Id. Even a liquidating debtor cannot ignore state disposal requirements if doing so would create a public “hazard with no one clearly responsible for remedial action.” *In re Wall Tube & Metal Prods. Co.*, 831 F.2d 118, 122 (6th Cir. 1987).

If the City cannot dump its toxic waste in violation of state law, surely it cannot put its elderly pensioners in harm’s way by taking away their only source of income and violating their constitutional rights. For just as this “Bankruptcy Court does not have the power to authorize an abandonment without formulating conditions that will adequately protect the public’s health and safety” from environmental danger, *Midlantic*, 474 U.S. at 507, this Court does not have the power to authorize cuts to vested pension rights which the Michigan Constitution recognizes as sacrosanct and not protected by federal government insurance. Until this Court holds conclusively that the state is responsible for the accrued pensions in full (or another funding source is provided by agreement), the Bankruptcy Code will not allow abandonment of this constitutional obligation.

II. CHAPTER 9 VIOLATES THE U.S. CONSTITUTION REGARDLESS OF WHO TECHNICALLY “IMPAIRS” CONTRACT RIGHTS

For three reasons, the City’s argument that chapter 9 is constitutional because the federal government, not the state, technically orders the impairment is flawed.

First, chapter 9 unconstitutionally permits the federal government to consent to a state impairment of contracts. Article I, Section 10, which contains the Contracts Clause, has three paragraphs. The second and third paragraphs prohibit states from taking certain acts “without the consent of Congress.” The first, in contrast, contains a wholesale prohibition on defined state actions, including, along with the impairment of contracts, printing money and the entering into of any treaty, alliance, or confederation, *with no exception for federal consent*.

The plain language of Article I, Section 10 therefore makes clear that Congress cannot

pass a law consenting to an impairment of contracts by the state. Supreme Court case law supporting this interpretation is found in *Rhode Island v. Massachusetts*, 37 U.S. 657 (1838), where the Supreme Court held that it had original jurisdiction over a boundary controversy between states. Reaching that holding required the Court to analyze Article I, Section 10. The Supreme Court interpreted the “first clause” as “a positive prohibition against any state” taking certain actions, and stated conclusively that “no power under the government could make such an act valid, or dispense with the constitutional prohibition.” 37 U.S. at 724-25. The Court thus left no doubt that Article I, Section 10, Clause 1 does not allow an end-run of state contracts.

The plan approval process in chapter 9 constitutes such unconstitutional federal consent. State and municipal actors take all the major steps on the road to debt adjustment: specific legal authorization of chapter 9, filing of the petition, and proposal of the plan. *See* 11 U.S.C. §§ 109(c)(2) & 941. Only then does the federal bankruptcy court provide *consent* – and violate the Contracts Clause – by confirming a plan proposed by the municipality. *See* 11 U.S.C. § 943(b).

This issue is a question of first impression on which this Court is not bound by precedent. Any comments in Justice Cardozo’s dissent in *Ashton* are not precedent binding this Court. *See, e.g., United States v. Jahns*, 2012 WL 928725, at *6 (N.D. Ohio Mar. 19, 2012) (“Dissenting Supreme Court opinions are not binding precedent.”). While the City points to language in *Bekins* which it claims “zeroes in on that they’re dealing with this particular issue,” Tr. 10/15/13 at 157:12-13, in fact *Bekins* identified the sole issue decided in that section of the opinion: “whether the exercise of the federal bankruptcy power in dealing with the composition of the debts of the [municipality], upon its voluntary application and with the State’s consent, must be deemed to be an unconstitutional interference with the essential independence of the State as preserved by the Constitution.” 304 U.S. at 49. Thus, the *Bekins* Court reconsidered the

federalism holding from *Ashton*, nothing more.

Second, even assuming *arguendo* (and, AFSCME submits, incorrectly) that chapter 9 only involves state consent to federal impairment, *Bekins* is no longer good law. *Asbury Park* and the Court's federalism jurisprudence since *New York* render *Bekins* inapposite because chapter 9 unconstitutionally allows a state to lose sovereign powers by consent.

Both the Court's decision in *Bekins* and Justice Cardozo's dissent in *Ashton* hinged on two since-disproven notions: (1) that "composition of debts . . . was not available under state law" due to the Contracts Clause, *Bekins*, 304 U.S. at 54; and (2) that "dispensing with the consent of the state" would render a federal municipal bankruptcy law "a dislocation of that balance between the powers of the states and the powers of the central government which is essential to our federal system." *Ashton*, 298 U.S. at 538 (Cardozo, J., dissenting). *See also* *Bekins*, 304 U.S. at 51-52 ("It is of the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power.")

As we know from *Asbury Park*, the first assumption is not true because "the necessity compelled by unexpected financial conditions to modify an original arrangement for discharging a city's debt is implied in every such obligation." 316 U.S. at 511. Thus, although the Contracts Clause continues to apply as a limit on the precise features of "a state insolvency act," *id.* at 513, such acts are allowed under the Constitution as an exercise of a state's "autonomous regulation" of the "peculiarly local" problem of "the fiscal management of its own household." *Id.* at 509.

The second assumption is untrue because in *New York* the Supreme Court made clear that state consent *cannot* enlarge the powers of Congress. AFSCME Am. Elig. Obj. ¶¶ 82-84. As noted, both Justice Cardozo's dissent in *Ashton* and the Court's opinion in *Bekins* assumed that state consent was *precisely* what was required to "remove the obstacle," 304 U.S. at 52, and

extend the power of municipal bankruptcy legislation to Congress. But this enlargement of federal power is what *New York* forbids – the incursion into the sovereign powers of another branch of government by the consent of that branch. The *Bekins* Court apparently tolerated that incursion because it thought the City “was powerless” to adjust debts under state law and therefore acted “in aid, and not in derogation, of its sovereign powers” by consenting to federal bankruptcy. 304 U.S. at 54. Since *Asbury Park* made clear that the City is not so powerless, state consent to federal control in chapter 9 is an encroachment on a sovereign power and therefore is unconstitutional under *New York*.

Third and in the alternative, further assuming *arguendo* (and, AFSCME submits, incorrectly) both that chapter 9 does not violate the constitutional prohibition on federal consent to state impairment *and* that *Bekins* is still good law, chapter 9 as amended violates the only remaining reasonable reading of *Bekins* consistent with the subsequently decided *Asbury Park* because use of a state municipal debt adjustment scheme requiring less than 100% creditor consent must be a remedy available to states. At the very least, therefore, the federal municipal bankruptcy statute ceased to be constitutional four years after *Asbury Park* when Congress amended it to deny states the sovereign right to adjust the debts of their own municipalities with less than 100% creditor consent, which is still the law today under Section 903(1).

If a municipality is so insolvent that it has no choice but to adjust its debts, Section 903(1) unconstitutionally forces it to reach 100% creditor consent and effectively compels it to resort to chapter 9. Doing so likewise forces the municipality to enlist its officers in designing a plan of adjustment according to federal rules and policies rather than different state rules and policies which might otherwise have been available under state insolvency law passed consistent with *Asbury Park* – for, as the City observed, Section 903(1) constitutes a “prohibition on

competing state municipal schemes.” Tr. 10/15/13 at 161:12-13. Congress’s attempt to coerce states into chapter 9 regardless of their desire to manage their affairs differently constitutes “overreaching in violation of the Tenth Amendment.” 16 Collier’s on Bankruptcy P 903.03[2].

The City’s counterargument that the Code’s prohibition on competing state municipal schemes represents “recognition that they’re not possible or workable” and that therefore Congress could not have “coerced anybody,” Tr. 10/15/13 at 161:12-13. 22, is inaccurate. The House “favored” amending the statute to revive states’ rights under *Asbury Park* in order to provide for “the availability of state composition proceedings as a less drastic alternative than bankruptcy,” but the Senate “opposed” the House “in the interest of national uniformity,” and “[t]he Senate’s view ultimately prevailed[.]” 16 Collier on Bankruptcy § P 903.LH[2]. This attempt to undo *Asbury Park* to deny to States an “alternative” to chapter 9 was unconstitutional coercion. See *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (“Congress may not legislatively supersede our decisions interpreting and applying the Constitution.”).

III. SECTION 109(C)(2) APPLIES A STATE LAW STANDARD AND BECAUSE PA 436 VIOLATES THE STATE CONSTITUTION THEREFORE THE CITY IS NOT ELIGIBLE FOR CHAPTER 9

As a threshold matter, because the state-law-authorization eligibility requirement in Section 109(c)(2) refers explicitly to “State law,” every court to consider the issue has correctly held that Section 109(c)(2) is “governed by a state rule of decision.” *In re City of Stockton*, 475 B.R. 720, 728-29 (Bankr. E.D. Cal. 2012) (collecting cases). An analogy between Section 109(c)(2) and the Supreme Court’s 11th Amendment sovereign immunity jurisprudence confirms this result for two reasons. First, under *Palmer v. Ohio*, 248 U.S. 32 (1918), the question of whether a state has waived sovereign immunity by passing a state law remains a question of state, not federal, law. See *Lee-Thomas v. Prince George’s County Public Schools*, 666 F.3d

244, 249-50 (4th Cir. 2012). Second, cases which have used a federal standard when deciding whether the state has waived sovereign immunity in other circumstances are distinguishable because the 11th Amendment, unlike Section 109(c)(2), does not explicitly refer to state law.

The State suggests that under its interpretation of the Michigan Constitution, the State could pass a law granting to the Governor the right to pick the mayor of Detroit. Tr. 10/16/13 at 14:8-12. But if, as the State contends, “[i]t’s not too simplistic” to say that the City “sets its own form of government through its charter unless the state dictates otherwise through its legislation,” Tr. 10/16/13 at 13:7-14, then the need for a home rule provision in the Constitution vanishes; local government could simply be governed by statute. However, it remains a bedrock principle of Michigan constitutional law that the Legislature *cannot* select the mayor of Detroit, or any other local representative. Any power the Legislature may have to amend the powers of local governments does not extend to the ability to appoint the EM because the legislature at most defines *what* powers the elected government has but not *who* will exercise those powers. As the Michigan Supreme Court has held, the Michigan Constitution incorporates the holdings of the Cooley Court establishing “the importance of elected representatives in any scheme of local government.” *Brouwer*, 377 Mich. at 653. At the local level, “while the people are suffered to go through the forms of an election, there shall not rest in some authority at a distance, the power to deprive the election of any valuable significance.” *Id.* (citation omitted). Local voters have the right to elect local officials, and the State cannot substitute unelected persons in their stead.

The State next argues that PA 436 “allows the emergency manager to simply execute the same executive powers that the elected officials of the community would have” and that therefore, because he is a local official as opposed to a state official, the Legislature has simply delegated to the EM the same powers it has delegated to the local government Tr. 10/16/13 at

16:21-23. The State argues that the EM can execute local power because he is a local official, not a state official, and thus the EM is delegated the same powers delegated to the local government. This argument fails for two reasons. First, the EM is a state official, not a local official. *See* AFSCME Am. Elig. Obj. ¶173. Second and regardless, the Legislature lacks the power to delegate local authority because under Article IV, Section 29 local authority already belongs to the local electors –inherently, with nothing left to delegate. *See* AFSCME Am. Elig. Obj. ¶ 151. The State unconstitutionally delegated this power without any *state law* standards to guide the EM *during bankruptcy*. Because local authority derives from the local electors, the State incorrectly suggests that the EM “is guided by the same standards that would have applied to the local officials when they were exercising that power.” Tr. 10/16/13 at 17:14-16. For if the Mayor or City Council take actions in bankruptcy which the people of Detroit dislike, the people of Detroit who elected them can vote them out of office. Not so for the EM.

CONCLUSION

AFSCME respectfully requests that this Court issue an order dismissing the City’s chapter 9 petition, or, in the alternative, ensuring that accrued pension benefits protected by Article IX, Section 24 of the Michigan Constitution are not endangered by this bankruptcy.

Dated: October 30, 2013

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UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION – DETROIT

----- X
In re: :
: Chapter 9
CITY OF DETROIT, MICHIGAN, :
: Case No.: 13-53846
Debtor. : Hon. Steven W. Rhodes
----- X

**SUPPLEMENTAL BRIEF OF INTERNATIONAL UNION, UAW IN
SUPPORT OF THEIR AMENDED OBJECTION TO THE CITY OF
DETROIT, MICHIGAN’S ELIGIBILITY FOR AN ORDER FOR
RELIEF UNDER CHAPTER 9 OF THE BANKRUPTCY CODE**

The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (“UAW”) submits this supplemental brief regarding its Amended Objections to the City of Detroit, Michigan’s Eligibility for Relief under Chapter 9 [DE 1170] (the “Amended Objection”).

Argument

**The Governor’s Approval of the Chapter 9 Filing Was Invalid
Under State Law and Cannot Be Saved by Federal Bankruptcy Law**

In issuing the July 18, 2013 approval letter, Governor Snyder was acting, and could only act, under *state* law. *See* 11 U.S.C. Section 109(c)(2) (requiring that the municipality be specifically authorized to be a debtor under State law, or by an officer empowered by State law). Here, confronted with a proposal by the Emergency Manager Kevyn Orr (the “EM”) that, on its face compelled a significant reduction in accrued vested pension benefits, thus implicating Article 9, Section 24 of the Michigan Constitution, the Governor’s approval necessarily required a condition

excepting accrued pensions. The Governor could not, consistent with State law, sign an approval for bankruptcy plan proposed that, as presented by the EM, would plainly violate the Michigan Constitution. Skirting that issue, however, Governor Snyder was apparently counting on *federal* law—through the federal bankruptcy court—to sort out the legal issues regarding the applicability of Article 9, Section 24.

But the Governor’s deferral to the federal bankruptcy court as the basis for not applying Article 9, Section 24 to his approval cannot save a defective authorization, which must be issued consistent with *state* law. The Governor cannot simply ignore a substantive provision of the Michigan Constitution that plainly applies to him in his official acts and was plainly implicated by the EM’s request for approval and instead rely upon federal law. Indeed, the conditions that led the Supreme Court to uphold the municipal bankruptcy law in *Bekins* were exactly the reverse: there, the Court expressly found that the taxing authority *was authorized by state law* to file the petition and to take the necessary steps to consummate the plan. *United States v. Bekins*, 304 U.S. 27, 47-48 (1938).¹ The state’s authorization did not depend upon the

¹ The *Ashton* dissent is not to the contrary. Justice Cardozo emphasized that the municipal bankruptcy law “does not dislocate the balance” between the powers of the states and those of the federal government, citing, among other things, the requirement for consent by the state where necessary by local law and that the “composition, though approved by the requisite majority, shall not be confirmed” unless the municipality is authorized by law to take all action necessary to carry out the plan. *Ashton v. Cameron County Water Improvement Dist.*, 298 U.S. 513, 538-40 (1936) (Cardozo, J., dissenting). *See also id.* at 540 (noting that “it is clear to the point of demonstration that the filing of a voluntary petition by a political subdivision does not violate the local law or any local public policy. Petitioners are not the champions of any rights except their own.”). Chapter 9 was deemed constitutional on these same grounds —adherence to state law—in *Bekins*. As expressed in the *Ashton* dissent, the operative function of the federal law was the ability to bind the minority—

federal law to paper over a violation of state law; then-chapter IX would have been found unconstitutional had the *Bekins* Court not found that the municipality was following *state* law in filing the bankruptcy case.

These are not the Depression-era conditions of municipal debt compositions, where holders of debt securities, having determined that the municipal well has run dry, could voluntarily decide to compromise their bond recoveries and obtain the requisite numbers to bind a minority through chapter IX. Here, the EM—aided by the Governor—embarked upon a plan to cut off the City’s pension funding obligations and use the money for a massive revitalization program, transforming those obligations into bankruptcy claims. Little wonder that pensioners, relying upon their state’s constitution to protect their accrued benefits, didn’t recognize that the Governor and the EM expected them to replicate the voluntary debt compositions of Depression-era bondholders.²

Thus, Section 109(c)(2) requires that authorization be based on state law and state law *alone*. *See In re Harrisburgh, PA*, 465 B.R. 744, 755 (Bankr. M.D. Penn. 2011) (rejecting Supremacy Clause argument to support eligibility and dismissing Chapter 9 petition as not authorized by state law).

the majority having agreed to the plan of composition as a condition of the bankruptcy filing—not overriding the state law. *See id.* at 541.

² Nor does the Governor have any authority to consent to the impairment or diminishment of accrued benefits on their behalf. Simply put, there was no state law source of authority for the Governor to approve the chapter 9 filing but not protect accrued pension benefits covered by Article 9, Section 24.

Article 9, Section 24 was plainly implicated in the EM's proposal and, under well-established principles applied by the Michigan courts to the interpretation of the state's constitution, plainly applied to the Governor's approval under PA 436. "The primary objective in interpreting a constitutional provision is to determine the text's original meaning to the ratifiers, the people, at the time of ratification." *County of Wayne v. Hathcock*, 684 N.W.2d 765, 779 (2004) (citing *People v. Nutt*, 677 N.W.2d 1, 6 (2004)). "The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it." *Federated Publ'ns, Inc. v. Bd. of Trustees of Mich. State Univ.*, 594 N.W.2d 491, 496 (Mich. 1999) (quoting 1 Cooley, *Constitutional Limitations* (6th ed.), p. 81) (emphasis in original); see also *Comm. for Constitutional Reform v. Secretary of State*, 389 N.W.2d 430, 432 (1986) (" 'The cardinal rule of construction, concerning language, is to apply to it that meaning which it would naturally convey to the popular mind' '[W]e should endeavor to place ourselves in the position of the framers of the Constitution, and ascertain what was meant at the time' ") (quoting, respectively, *People v. Dean*, 14 Mich. 406, 417 (1866); *Pfeiffer v. Detroit Bd. of Ed.*, 77 N.W. 250, 251 (1898)).

Applying these principles, the Michigan courts have emphasized that Article 9, Section 24 expresses "the firmly established right of public employees to receive pension payments as those payments become due." *Kosa v. Treasurer of State of Mich.*, 292 N.W.2d 452, 460 (Mich. 1980). The courts have construed Article 9, Section 24 to protect pension benefits earned as deferred compensation for services performed and to establish that such benefits, having been earned, are vested and cannot be reduced. *E.g.*, *Advisory Opinion re Constitutionality of 1972 P.A. 258*, 209

N.W.2d at 202 (“[T]he benefits of pension plans are in a sense deferred compensation for work performed. And with respect to work performed, ... the public employee should have a contractual right to benefits of the pension plan, which should not be diminished by the employing unit after the service has been performed.’”) (quoting 1 Official Record, Constitutional Convention 1961, 770-771). *See also In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 806 N.W. 2d 683, 694 (Mich. 2011) (“The obvious intent of § 24 [] was to ensure that public pensions be treated as contractual obligations that, once earned, could not be diminished.”).³

The absence of a reference to municipal bankruptcy in Article 9, Section 24 does not render it inapplicable in chapter 9 nor ambiguous in that regard. The provision itself expresses no exceptions, and the Michigan courts have said that every possible condition to which a constitutional provision would apply need not be spelled out. *See Nat’l Pride at Work, Inc. v. Governor*, 748 N.W.2d 524, 540 n.21 (Mich. 2008) (“the fact that a constitutional provision does not explicitly set forth every specific action that is prohibited does not mean that such a provision is ambiguous”). Moreover, the courts apply the words that are there—nothing is superfluous. *See Syntex Labs., Inc. v. Dep’t of Treasury*, 470 N.W. 2d 665, 667-68 (1991) (interpreting constitutional provision prohibiting sales and use taxes and declining to ignore reference to use tax as surplusage, noting “we borrow from the rules of statutory

³ A “vested right” is “an interest that the government is compelled to recognize and protect of which the holder could not be deprived without injustice.” *City of Detroit v. Walker*, 520 N.W.2d 135, 143 (Mich. 1994).

construction the rule that no word should be treated as surplusage or rendered nugatory if at all possible.”).

A reference to municipal bankruptcy would have been most unlikely in 1963 in any event. Chapter IX at the time was in a form much closer to the 1946 version than to the current statute. *See generally*, 6 Collier on Bankruptcy, ¶ 900.LH[4] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (noting that, until 1976, “Chapter IX, remained unchanged and virtually unused for 30 years Chapter IX as it then existed was scarcely usable by a large city....” (citations to legislative history of 1976 revision of Act omitted). Moreover, the idea that pension funding obligations—only just memorialized in the 1963 constitution—were debts subject to “composition” under Michigan’s 1939 bankruptcy authorization statute would have been unimaginable. This is particularly so since from 1946 to 1976, “only securities debts could be modified in a chapter IX plan.” *In re Stockton, Cal.*, 486 B.R. 194, 196 (Bankr. E.D. Cal. 2013).

Nor can the City’s attempt to hide behind its own label of the funding obligations—unsecured claims to be treated the same as other unsecured claims under its plan—cannot shield the City from Article 9, Section 24. First, as shown above, *state* law governs authorization and, consistent with the courts’ well established principles of construction, Article 9, Section 24 plainly forbids impairment or diminishment of accrued vested pensions through a bankruptcy principles of construction, authorized by the State. In any event, the EM must have known that as a chapter 9 debtor, the City would have wide latitude to spend its money for any reason, including “even in a manner that disadvantages other creditors” unless the

municipality consents to judicial oversight. *In re Stockton, Cal.*, 486 B.R. at 198-99. Section 904 of the Bankruptcy Code (called by the *Stockton* court “a keystone in the constitutional arch between federal bankruptcy power and state sovereignty,” *id. at* 198) means that the City can expend its property and revenues during the chapter 9 case as it wishes.” *Id. at* 199. The City has simply adopted a label of convenience for the pension funding obligations, in part because it wishes to divert the funding obligation money to its revitalization program—a deliberate choice on the City’s part—and in part, perhaps, to avoid having to explain the choice to maintain its obligation to fund accrued vested pensions to its bondholders or their insurers.⁴

Moreover, the City cannot rely upon the characterization of pension funding obligations from chapter 11 case law, because the courts have made clear that the cessation of a private company’s funding obligations, leading to termination of a pension plan, is inextricably linked to the guaranty program Congress enacted to backstop accrued pensions in the event the employer’s funding ceased. *E.g., PBGC v. LTV Corp.*, 496 U.S. 633 (1990) (upholding PBGC’s restoration of company pension plan when company and union negotiated a follow-on plan contrary to agency’s policies as pension insurance guarantor); *In re UAL Corporation*, 428 F.3d 677 (7th Cir. 2005) (upholding settlement between PBGC and airline as consistent with PBGC’s authority as federal “backstop” for pension benefits). Here, there is no

⁴ One might ask whether the City’s insistence on treating the funding obligations as unsecured claims operates as a form of “consent” under Section 904, by casting the Court as the decision-maker on the pension issues, and yet not expressly consenting to the Court’s authority over spending under Section 904.

similar guaranty program. There is only Article 9, Section 24. The basis on which the City can cease its funding obligations cannot simply be decreed as a mere claims recovery exercise.⁵ Accordingly, federal law cannot save an authorization that violated state law, and therefore violates Section 109(c)(2).

⁵ Indeed, Congress did not extend ERISA to public sector plans because “the ability of the governmental entities to fulfill their obligations to employees through their taxing powers’ was an adequate substitute for both minimum funding standards and plan termination insurance.” *Rose v. Long Island Pension Plan*, 828 F.2d 910, 914 (2d Cir. 1987) (quoting legislative history of ERISA). In addition, Congress determined that extending ERISA’s requirement to state pension plans would unduly interfere with the administration of public retirement plans, or, put another way, in recognition of principles of federalism. *Id.* Thus, allowing the City to use federal bankruptcy law to create its own plan termination rules by simply wiping out its funding obligation, devoid of any guaranty program, creates the very interference of federal authority that Congress has rejected in connection with state pension plans.

CONCLUSION

For the foregoing reasons, and those set forth in the Amended Objection, the City's chapter 9 petition should be dismissed.

Dated: New York, New York
October 30, 2013

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**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

<i>In re:</i>)	
)	
CITY OF DETROIT, MICHIGAN,)	Chapter 9
)	Case No. 13-53846
<i>Debtor.</i>)	Hon. Steven W. Rhodes
_____)	

**SUPPLEMENTAL BRIEF IN SUPPORT OF
OBJECTION OF THE DETROIT RETIREMENT SYSTEMS TO
THE ELIGIBILITY OF THE CITY OF DETROIT, MICHIGAN, TO BE
A DEBTOR UNDER CHAPTER 9 OF THE BANKRUPTCY CODE¹**

¹ The Retirement Systems are filing this Supplemental Brief pursuant to the Court's Order Regarding Further Briefing on Eligibility, dated October 17, 2013 (Dkt. No. 1217). This Supplemental Brief is filed subject to the reservations of rights in the Appearance filed by the undersigned counsel in this case, including the Retirement Systems' right to argue that this Court lacks subject matter jurisdiction. This Supplemental Brief incorporates by reference the arguments and objections previously raised by the Retirement Systems in the Objection of the Detroit Retirement Systems to the Eligibility of the City of Detroit, Michigan to Be a Debtor Under Chapter 9 of the Bankruptcy Code (Dkt. No. 519) (the "Objection") and the Reply in Support of Objection of the Detroit Retirement Systems to the Eligibility of the City of Detroit, Michigan to Be a Debtor Under Chapter 9 of the Bankruptcy Code (Dkt. No. 1166) (the "Reply"). The Retirement Systems also join in the objection of the Retired Detroit Police Members Association that PA 436 is ineffective because it was enacted in violation of the Referendum Clause of the Michigan Constitution.

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The Police and Fire Retirement System of the City of Detroit and the General Retirement System of the City of Detroit (together, the “Retirement Systems”) respectfully submit this Supplemental Brief in support of their objection to the eligibility of the City of Detroit, Michigan (the “City”) to be a debtor under Chapter 9 of the Bankruptcy Code. For the reasons set forth in the Retirement Systems’ Objection and Reply and in other objections: (a) the Pensions Clause does not conflict with the Bankruptcy Code’s priority scheme; (b) any impairment of accrued pension benefits in this case is prohibited by the Pensions Clause; and (c) if the Court were to conclude that the protections of the Pensions Clause are irreconcilable with Chapter 9, then the only conclusion is that the City’s petition must be dismissed.

I. THE PENSIONS CLAUSE CAN BE ENFORCED CONSISTENTLY WITH THE BANKRUPTCY CODE

An order for relief that gives effect to the Pensions Clause and prohibits diminution or impairment of the City’s pensions does not contravene any provision of the Bankruptcy Code, including the claims priority scheme under Chapter 9.²

² To what extent a priority scheme exists under Chapter 9 is not entirely clear, in the absence of the incorporation of most of section 507(a) into Chapter 9. The Retirement Systems reserve all rights regarding this issue.

A. State Law Determines the Legal Nature and Substance of Claims in Bankruptcy

The nature of a claim, and the substantive rights of creditors, are always determined in the first instance by state law. *See Travelers Cas. & Sur. Co. of Am. v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 450-51 (2007) (“state law governs the substance of claims, Congress having generally left the determination of property rights in the assets of a bankrupt’s estate to state law”) (citation omitted); *Butner v. U.S.*, 440 U.S. 48, 55 (1979) (“Property interests are created and defined by state law.”). Here, applicable state law – the Michigan Constitution – provides that vested pensions constitute property rights that shall not be diminished or impaired.

B. Under Michigan Law, Accrued Pension Obligations are Vested Property Rights that Cannot Be Impaired

Board of Regents v. Roth, 408 U.S. 564 (1972), explains that certain types of contract rights rise to the level of “property” protected by the Constitution from deprivation by state action:

To have a property interest in a benefit [provided by the state], a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. . . .

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as

state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. at 577. The vested pension benefits of Detroit’s employees and retirees fall squarely within this definition of “property” for purposes of constitutional protection: they are claims of entitlement which are protected under the State’s highest law, and public employees rely in their daily lives upon the inviolability of these rights. Indeed, courts have applied *Roth* to pension benefits when interpreting constitutional provisions very similar to the Pensions Clause. *See, e.g., Russell v. Dunston*, 896 F.2d 664, 668-669 (2d Cir. 1990) (applying *Roth* to pension obligations protected by state constitutional provision); *Marconi v. Chicago Heights Police Pension Bd.*, 361 Ill. App. 3d. 1, 24 (Ill. App. 2005), *rev’d on other grounds*, 225 Ill.2d 497 (2006) (same).

Michigan case law confirms that accrued pension benefits are earned and vested rights, to which, in accordance with *Roth*, each vested employee or retiree has a “legitimate claim of entitlement,” amounting to a “property interest in a benefit.” As the Michigan Supreme Court has recognized, “pension obligations differ from nearly every other type of government spending insofar as they simply cannot be reduced or cut. . . . Michigan governmental units do not have the option . . . of not paying retirement benefits.” *Musselman v. Governor of Mich.*, 533 N.W.2d 237, 243 (Mich. 1995), *aff’d on reh’g*, 545 N.W.2d 346 (Mich. 1996). Moreover, “the state may not reduce the pension benefit of any state employee or

official, or local employee or official, once a pension right has been granted.” *Seitz v. Probate Judges Ret. Sys.*, 474 N.W.2d 125, 130 (Mich. App. 1991), *appeal denied*, 482 N.W.2d 459 (Mich. 1992), *reconsideration denied*, 483 N.W.2d 898 (Mich. 1992).

C. The Bankruptcy Code Provides for Different Treatment of Legally Distinct Claims

Giving full effect to Michigan law protecting pension benefits is fully consistent with the Bankruptcy Code. The Code defines claims by their rights under state law, and not all unsecured claims are equal under state law. The Code permits even radically different treatment among classes of unsecured claims, when such distinctions are justified by differences in the claims’ legal rights and attributes. The Sixth Circuit has so held. *See, e.g., Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 661-63 (6th Cir. 2002), *cert. denied*, 537 U.S. 816 (2002) (separate classification and treatment of foreign and domestic unsecured tort claimants, resulting in a recovery differential of 35-60%, was proper because tort awards in other countries were significantly lower than U.S. tort awards); *Teamsters Nat’l Freight Indus. Negotiating Comm. v. U.S. Truck Co. (In re U.S. Truck Co.)*, 800 F.2d 581, 584-87 (6th Cir. 1986) (permitting separate classification of union’s claims, due to unique interest of its represented employees in debtor’s ongoing business and impact on future collective bargaining process); *In re General Homes Corp.*, 134 B.R. 853, 863

(Bankr. S.D. Tex. 1991) (“The legal character of a claim may also itself justify both disparate classification and treatment.”). Indeed, where the legal rights differ materially from one type of claim to another, separate classification is not just permitted, it is *required*. As provided by §1122(a), “a plan may place a claim or an interest in a particular class *only if such claim or interest is substantially similar to the other claims or interests of such class*.” (emphasis supplied). *See also Aetna Cas. & Sur. Co. v. Clerk (In re Chateaugay Corp.)*, 89 F.3d 942, 949 (2d Cir. 1996) (“Dissimilar claims may not be classified together”). Separate classification and disparate treatment is not limited to Chapter 11: it is also appropriate in Chapter 9, as §901 expressly incorporates §1122. *See In re Jersey City Med. Ctr.*, 817 F.2d 1055, 1060-61 (3d Cir. 1987) (upholding separate classification and disparate treatment of, *inter alia*, employee benefit plan claims versus trade creditor claims); *Sanitary & Improvement Dist. 65 of Sarpy Cty., Neb. v. First Nat’l Bank of Aurora*, 79 B.R. 877 (D. Neb. 1987), *aff’d on other grounds*, 873 F.2d 209 (8th Cir. 1989) (upholding separate classification and treatment of bondholders versus warrant holders, due to different attributes and rights of repayment under state law). Unsecured claims with substantially different legal rights under applicable state law are simply *not* required to be treated *pari passu*.³

³ Similarly, §943(b)(7)’s “best interests of creditors” requirement would not bar preservation of accrued pension obligations under a plan. Unlike Chapter 11, Chapter 9 does not test a plan by comparison to a liquidation alternative – the alternative is dismissal of the case. *See Cty. of*

D. Non-Impairment of Pension Obligations Will Not Violate the Bankruptcy Code

Enforcing the Pensions Clause by prohibiting the impairment of accrued pension benefits in this case does not conflict with any claims priority scheme under Chapter 9. To the contrary, Chapter 9 itself contemplates classes of unimpaired unsecured claims. Section 944(c)(1) provides that a municipal debtor will not be discharged from any debt that is “excepted from discharge by the plan or order confirming the plan” Yet Chapter 9 contains no specific provisions identifying claims that may or must be excepted from discharge.⁴ The City argued in rebuttal that §944(c) was simply designed to provide unilateral flexibility to the reorganizing entity. But nothing in the Bankruptcy Code suggests that §944(c) is so limited, and that it cannot accommodate a constitutional mandate to protect certain claims. Rather, §944(c) can and should be interpreted as recognizing the nondischargeability of pension benefits under the Michigan Constitution, due to the unique sovereignty and federalism issues implicated in Chapter 9.

Orange v. Merrill Lynch & Co. (In re Cty. of Orange), 191 B.R. 1005, 1020 (Bankr. C.D. Cal. 1996). For the tens of thousands of Detroit pensioners, absent non-impairment in the Chapter 9 case, their non-bankruptcy alternative is better: strict enforcement of the Pensions Clause under Michigan law.

⁴ Other than incorporating parts of §524(a) describing the *effect* of a discharge, §944(c) is the only provision of Chapter 9 that addresses discharge; §§523, 727, and 1141(d) of the Bankruptcy Code are not applicable in Chapter 9. *See* 11 U.S.C. § 901(a).

It is widely accepted that cities *may* separately classify pension obligations and treat them as unimpaired, while materially impairing bondholders and other classes of unsecured creditors: Vallejo's plan did so;⁵ Stockton's plan proposes to do so.⁶ If such treatment is permitted on a voluntary basis, it is likewise appropriate when compelled by fundamental differences in the legal rights granted to pensions under state law and the cities' special relationship to their employees.⁷ No conflict exists between Chapter 9 and state laws protecting pensions.

Here, the City could comply with the Michigan Constitution by excepting accrued pension obligations from discharge, consistent with the Pensions Clause. Such compliance would avoid (i) rendering PA 436 unconstitutional or (ii)

⁵ *In re City of Vallejo, CA.*, Case No. 08-26813, Order Confirming Second Amended Plan for the Adjustment of Debts of City of Vallejo, California, as Modified August 2, 2011, Ex. 1, at 34 (Doc. No. 1113) (Bankr. E.D. Cal. Aug. 4, 2011) (CalPERS pension plan was not impaired; city would continue to honor its pension obligations pursuant to non-bankruptcy law).

⁶ *In re City of Stockton, CA.*, Case No. 12-32118, Plan for the Adjustment of Debts of City of Stockton, California, at 71-72 (Doc. No. 1133) (Bankr. E.D. Cal. Oct. 10, 2013) (CalPERS pension plan not impaired; city would continue to honor its pension obligations pursuant to non-bankruptcy law).

⁷ Non-impairment of pension obligations would be permissible whether a plan is confirmed consensually or under the Code's cram-down provisions, because the absolute priority rule in §1129(b)(2)(B) (which is incorporated by §901) requires only that if a class of unsecured claims is not paid in full, no *junior* class will receive or retain any property on account of such claim, and the Retirement Systems' claims are not junior to any other unsecured claims. Even without the imprimatur of §944(c), §§1122(a) and 1123(a)(1) have been held to permit separate classification of nondischargeable claims and different treatment from that afforded to unsecured creditors whose claims are subject to the §1141(d)(1)(A) discharge. *See In re Weingarden*, 84 B.R. 691, 692 (Bankr. S.D. Cal. 1988).

rendering the City’s eventual plan unconfirmable, either as contrary to state law under §943(b)(4) or because it is subject to a popular vote on a constitutional amendment of the Pensions Clause under §943(b)(6).⁸ Nor would treating accrued pension obligations as unimpaired, as required by the Pensions Clause, violate the uniformity of bankruptcy law. Federal bankruptcy law does not preempt the field with respect to the characterization and treatment of claims in bankruptcy cases. On the contrary, *Butner* and *Travelers* require bankruptcy courts to look to state law to determine claims and property interests. Absent a direct conflict between state and federal law, “the state and federal legislatures share concurrent authority to promulgate bankruptcy laws” *Rhodes v. Stewart*, 705 F.2d 159, 163 (6th Cir. 1983), *cert. denied*, 464 U.S. 983 (1983) (citations omitted). Accordingly, states are presumptively permitted to act in the sphere of bankruptcy laws, subject to the Supremacy Clause and the doctrine of conflict preemption. *See Richardson v. Schafer (In re Schafer)*, 689 F.3d 601, 607 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 1244 (2013) (upholding Michigan exemption statute).

No grounds for conflict preemption exist here: (1) state law determines the legal character of pension-benefit claims in bankruptcy, (2) the Bankruptcy Code

⁸ *See, e.g., In re City of Colorado Springs Spring Creek Gen. Imp. Dist.*, 177 B.R. 684, 695 (Bankr. D. Colo. 1995) (“Federal law cannot obliterate or supersede requirements for elections imposed by Colorado law. Chapter 9 provides only a forum and a mechanism for reorganization; state law establishes the eligibility and substantive requirements for and limitations upon reorganization”).

permits different treatment of claims based on their underlying legal rights, (3) such differences in treatment do not violate any priority scheme of Chapter 9, and (4) §944(c)(1) broadly permits a municipal debtor to except claims from discharge. The Pensions Clause is not *actually* in conflict with any federal bankruptcy provision or policy, and can and must be enforced in the City’s Chapter 9 case. *See Schafer*, 689 F.3d at 613 (“state laws are thus suspended *only to the extent of actual conflict* with the system provided by the Bankruptcy Act of Congress”) (quoting *Stellwagen v. Clum*, 245 U.S. 605, 613 (1918)).

II. IMPAIRMENT OF ACCRUED BENEFITS IN THIS CASE WOULD INDEED VIOLATE THE PENSIONS CLAUSE

The City has argued that the only “impairer” of accrued pension benefits in this case would be the federal government, and therefore the Pensions Clause’s prohibition against impairment by the State or its political subdivisions is of no moment. At oral argument, the City specifically relied upon *Bekins v. United States*, 304 U.S. 27 (1938). However, *Bekins* did not hold that the Chapter 9 debtor is not an active participant in the impairment of contracts under its own proposed plan. Moreover, this argument runs directly contrary to the language of §109(c)(5)(A) and (B), which recognizes that the *debtor* is the relevant actor by explicitly referring to the *debtor entity’s* intention to impair claims under a plan.⁹

⁹ *Bekins* interprets only the *federal* Constitution, not Michigan’s, in holding that, provided the state has affirmatively consented to a filing, the predecessor of Chapter 9 is not unconstitutional.

III. UNLESS ELIGIBILITY IS CONDITIONED UPON NON-IMPAIRMENT OF PENSIONS, THE CASE MUST BE DISMISSED

The only way for the City to proceed in Chapter 9 without violating the United States and Michigan Constitutions is to condition the filing on the non-impairment of accrued pension benefits. If the Court were to find that this condition conflicts impermissibly with the Bankruptcy Code, then the City simply is not eligible to be a debtor under §109(c), and the petition must be dismissed.¹⁰ Respectfully, this is the only solution that comports with the Tenth Amendment.

Dated: October 30, 2013

Respectfully submitted,

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Bekins does not address, much less rule upon, the issue of whether the circumstances of a Chapter 9 filing might violate a *state* constitution.

¹⁰ *Cty. of Orange* and the City's other authorities are inapposite because they neither (a) involved a state *constitutionally* protected class of claims, nor (b) addressed such a protection as a ***threshold, gating*** eligibility issue under §109(c)(2).

CERTIFICATE OF SERVICE

The undersigned certifies that on October 30, 2013, the foregoing document was filed using the Court's CM/ECF system, which CM/ECF system will send notification of such filing to all parties of record.

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Dated: October 30, 2013

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE:

Chapter 9

City of Detroit, Michigan,

No. 13-53846

Debtor.

Hon. Steven W. Rhodes

**SUPPLEMENTAL BRIEF OF THE DETROIT PUBLIC SAFETY UNIONS
ON ELIGIBILITY PURSUANT TO ORDER REGARDING FURTHER
BRIEFING ON ELIGIBILITY [DOCKET NO. 1217]**

The Detroit Fire Fighters Association (the “DFFA”), the Detroit Police Officers Association (the “DPOA”), the Detroit Police Lieutenants & Sergeants Association (the “DPLSA”) and the Detroit Police Command Officers Association (the “DPCOA”) (collectively, the “Detroit Public Safety Unions”), through their counsel, Erman, Teicher, Miller, Zucker & Freedman, P.C., state as follows for their Supplemental Brief in Support of Eligibility:

1. The Detroit Public Safety Unions join in the supplemental briefs filed by the Detroit Retirement Systems [Docket No. 1472], by the UAW [Docket No. 1469] and AFSCME [1467].

2. The Detroit Public Safety Unions further note that under applicable state and federal law, the Detroit Public Safety Unions are not eligible for and,

hence, do not receive Social Security retirement or disability benefits. Although Title II of the Social Security Act allows states, after a referendum, to consent to extend social security retirement and disability benefits to state and municipal employees, 42 U.S.C. §218,01, Section 218(d)(5)(A) precludes the extension of such benefits to police and firefighters.¹ Hence, Michigan's act extending such benefits to certain state and municipal employees, MCL 38.851, *et seq*, does not apply to police and firefighters, leaving them entirely dependent on the pension provided by the Detroit Police and Fire Retirement System upon their retirement or disability.

3. As such, active and retired Detroit police and firefighters, whose pensions the Emergency Manager proposes to significantly impair in direct violation of Art IX, Sec. 24 of the Michigan constitution have even less of a “backstop” than that provided by the PBGC. *See* UAW Supplemental Brief at pp. 7-8.

4. Given the lack of “social security” extended to police and firefighters, including Detroit police and fire fighters, it seems unimaginable that the citizens of Michigan, when they ratified this provision in 1962, thought the protections

¹ As set forth in 42 U.S.C. §218(d)(5)(a), “Nothing in paragraph (3) of this subsection shall authorize the extension of the insurance system established by this title to service in any policeman’s or fireman’s position.”

provided by Art. IX, Sec. 24 could be “trumped” by federal bankruptcy law. As the Michigan Supreme Court has noted, quoting Justice Cooley, “‘For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.’ (Cooley's Const Lim 81).” *Traverse City School District v. Attorney General*, 384 Mich. 390, 405; 185 N.W.2d 9, 14 (1971).

5. Given the specific and absolute protection afforded public employees by Art. IX, Sec. 24 and given the limitations imposed by the 10th Amendment on this Court’s authority to interfere with the City’s the political decisions necessitated by its obligation to provide essential services to its citizens, the Governor’s authorization of the filing of the bankruptcy petition can only be squared with those constitutional requirements if it is read, consistent with the state law from which that specific authority flows, to preclude the impairment of the vested, accrued pension rights of active and retired Detroit fire and police officers.

Respectfully submitted,

ERMAN, TEICHER, MILLER,
ZUCKER & FREEDMAN, P.C.

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DATED: October 30, 2013

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

-----X	:	
In re	:	Chapter 9
	:	
CITY OF DETROIT, MICHIGAN,	:	Case No. 13-53846
	:	
Debtor.	:	Hon. Steven W. Rhodes
	:	
-----X	:	

**CITY OF DETROIT'S SUPPLEMENTAL BRIEF
IN SUPPORT OF ENTRY OF AN ORDER FOR RELIEF**

The City of Detroit (the "City") respectfully submits this supplemental brief in support of the entry of an Order for Relief¹ in this chapter 9 case and in response to supplemental briefs (each, a "Supplemental Brief") filed by certain Objectors.

I. PA 436 Does Not Violate Art. II, § 9 of the Michigan Constitution

The Objectors suggest that PA 436 violates Article 2, Section 9 of the Michigan Constitution because it is allegedly a "contrive[d] mechanism[] designed

¹ Capitalized terms used but not defined herein shall have the meaning given to them in the (a) Declaration of Kevyn D. Orr in Support of City of Detroit, Michigan's Statement of Qualifications Pursuant to Section 109(c) of the Bankruptcy Code (Docket No. 11) (the "Orr Declaration") and (b) City of Detroit's Pre-Trial Brief in (I) Support of Entry of an Order for Relief and (II) Opposition to Objections Requiring the Resolution of Issues of Material Fact (Docket No. 1240) (the "City Pre-Trial Brief").

specifically to 'thwart' the referral process." See, e.g., RDPMA Supplemental Brief, at 8-9.² This assertion is unwarranted.

Under Michigan law, the motives of the Michigan legislature in passing PA 436 (or any provision thereof) are irrelevant to an inquiry into the statute's constitutionality. Michigan United Conservation Clubs v. Secretary of State, 630 N.W.2d 297 (Mich. 2001), is instructive on this point. Concurring with the Michigan United majority's reversal of the Court of Appeals' holding that a statute including an appropriations provision was nevertheless subject to referendum, Chief Justice Corrigan observed that

the Legislature's subjective motivation for making a \$1,000,000 appropriation ... – assuming one can be accurately identified – is irrelevant. Intervening defendant contends that ... the "purpose" of the appropriation ... was to evade a referendum. This argument is misplaced. This Court has repeatedly held that courts must not be concerned with the alleged motives of a legislative body in enacting a law, but only with the end result – the actual language of the legislation....

² A related argument offered by the RDPMA – that PA 436 is ineffective and violates Article 2, Section 9 by virtue of having been enacted by the State legislature prior to having been approved by a majority of the Michigan voters – improperly assumes an identity between the rejected PA 4 and PA 436 and is easily dispatched. Unlike PA 4, PA 436 has never been the subject of a referendum pursuant to Article 2, Section 9, and cannot be the target of such power. Voter approval of PA 436 was not a prerequisite to the effectiveness thereof. Likewise, Objectors identify no constitutional prohibition against PA 436's passage solely because it addressed subject matter similar to the recently-rejected PA 4 and none should be implied.

[T]o make legislation depend upon motives would render all statute law uncertain.... Therefore the courts do not permit a question of improper legislative motives to be raised, but they will in every instance assume that the motives were public and befitting the station. They will also assume that the legislature had before it any evidence necessary to enable it to take the action it did take.

Mich. United, 630 N.W.2d at 298-99 (Corrigan, C.J., concurring) (quoting Cooley, Constitutional Law, pp. 154-55).³ The Michigan Supreme Court has made clear that, if the State's citizens believe its legislators to have been improperly motivated, their recourse is not the judiciary, but the constitutional powers of referendum and initiative *and the ballot box*. See, e.g., Houston, 810 N.W.2d at 256 ("[I]t is the responsibility of the democratic, and representative, processes of government to check what the people may view as political or partisan excess by their Legislature."); Mich. United, 630 N.W.2d at 298 (emphasizing that "the intervening defendant retains a direct remedy, the initiative process. Under our

³ See also Houston v. Governor, 810 N.W.2d 255, 256 (Mich. 2012) (stating that "nothing that is relevant [to determining the constitutionality of a statute] can be drawn from the political or partisan motivations of the parties"); Kuhn v. Dep't of Treasury, 183 N.W.2d 796, 799 (Mich. 1971) (rejecting argument that statutory language addressing meeting deficiencies in state funds was "a devious attempt to avoid the people's constitutional power of referendum;" stating that "[w]e will not concern ourselves with the legislators' motives for inserting the language regarding meeting deficiencies in the Act"); People v. Gardner, 106 N.W. 541, 542 (Mich. 1906) ("Nothing is better settled than the rule that the motives of a legislature or of the members cannot be inquired into, for the purpose of determining the validity of its laws.").

state constitution, this remedy is available even when the Legislature has made an appropriation....").⁴

Even if Michigan law did not prohibit an inquiry into the motivations of Michigan's legislators (which it does), the evidence does not demonstrate that the State included appropriations provisions in PA 436 for the sole purpose of improperly insulating the legislation from referendum. The RDPMA's citation to the deposition testimony of Howard Ryan, the State's Rule 30(b)(6) witness, shows only that (A) the appropriations provision was included in the legislation at an early stage in its development and (B) that PA 436 was intended to provide the State with options in the event of a municipal financial emergency should PA 4 be rejected. See RDPMA Supplemental Brief, at 4-5. There is nothing in the testimony cited by the RDPMA that suggests – much less that demonstrates – that such provisions were included for the allegedly improper purpose of frustrating

⁴ Consideration of the evidentiary challenges inherent in the attempt to divine a legislature's motivations demonstrates that the Michigan Supreme Court's long-standing rule against such attempts is well-founded. For example, it would be essentially impossible for a court to determine the intentions of the sundry legislators in each of the legislature's two houses involved in a bill's passage. Even if such a determination were possible, the court would be charged with determining whose intent was relevant (the majority's? a majority of the majority?) and possibly whether such intent was the legislators' sole or even primary motivation. See Houston, 810 N.W.2d at 256 ("[T]his Court possesses no special capacity, and there are no legal standards, by which to assess the political propriety of actions undertaken by the legislative branch.").

Article 2, Section 9.⁵ Mr. Ryan is not a State legislator and, thus, did not vote on the bill, nor could he divine the intent of each legislator that voted on the bill.⁶

Moreover, the inclusion of appropriations provisions in PA 436 is simply irrelevant to an inquiry into the constitutionality of the statute. The inclusion of appropriation provisions may be relevant to a frustrated attempt to subject legislation to the referendum process. See Mich. United, 630 N.W.2d at 299-300 (Young, J., concurring) (describing an unsuccessful attempt to subject legislation to referendum). Yet even a successful challenge to the inclusion of such provisions would not render the legislation unconstitutional; it would merely render it subject to referendum. Where no such challenge has been made and no referendum process ever initiated (as is the case with PA 436), there is no practical, much less constitutional, consequence to the inclusion of such provisions.

⁵ Similarly, contrary to the RDPMA's suggestion, Jones Day and the State did not conspire to include an appropriations provision in PA 436. The document cited to this effect – Objectors' Exhibit 201 – is an email dated March 2, 2012 (i.e., months prior to the drafting and proposal of PA 436) that does not even refer to an emergency manager statute in discussing the effect of appropriations provisions. The notion that a months-old email – on a different topic – might have influenced the drafting of PA 436 is absurd.

⁶ Moreover, on October 28, 2013, the Governor testified – under direct examination from the RDPMA – that the appropriations provisions in PA 436 were included (a) to relieve municipalities of the burden of paying the salaries of emergency managers and the costs of financial consultants and (b) in direct response to concerns raised during the referendum process related to PA 4. See Transcript of Hearing regarding Eligibility Trial conducted on October 28, 2013, at 223:4-14.

Accordingly, PA 436 does not violate Article 2, Section 9 of the Michigan Constitution and the City's satisfaction of section 109(c)(2) of the Bankruptcy Code cannot be undermined by the circumstances of PA 436's passage.

II. Bekins Confirms That Impairment of Municipal Contractual Obligations is Effected by the Bankruptcy Court

Numerous Objectors – concerned that the Pensions Clause's prohibition on impairment of pension obligations "[]by" the State would not apply to potential impairments of such obligations pursuant to a plan of adjustment – contest the proposition that any impairment of the City's various contractual obligations in this chapter 9 case will be effected not by the City or the State, but by the federal government through the Court. E.g., AFSCME Supplemental Brief, at 4-8; Retiree Associations Supplemental Brief, at 7-8. Yet the United States Supreme Court in United States v. Bekins, 304 U.S. 27 (1938), made clear that it is federal, and not state, power being exercised. Citing the legislative history of former Chapter X of the Bankruptcy Act (the predecessor to chapter 9), the Bekins court identified the dilemma confronting "taxing agencies" (i.e., Chapter X's version of "municipality") in the absence of federal relief: an inability to pay their debts on one hand and the lack of recourse to state municipal debt adjustment regimes forbidden by the Contracts Clause on the other. "There is no hope for relief through statutes enacted by the States, because the Constitution forbids the passing of State laws impairing the obligations of existing contracts. *Therefore, relief must come from Congress, if*

at all." Bekins, 304 U.S. at 51 (citing S. Rep. No. 911, 75th Cong., 1st Sess.) (emphasis added).

Chapter X resolved this dilemma:

In the instant case we have cooperation to provide a remedy for a serious condition in which the States alone were unable to afford relief.... The natural and reasonable remedy through composition of the debts of the district was not available under State law by reason of the restriction imposed by the Federal Constitution upon the impairment of contracts by state legislation. The bankruptcy power is competent to give relief to debtors in such a plight.... Through [the State's] cooperation with the national government the needed relief is given.

Id. at 53-54. Thus, Bekins confirms that, through consenting to the filing of a municipality's bankruptcy petition, a State that is constitutionally forbidden from impairing a municipality's improvident contracts nevertheless may allow such municipality to obtain relief from the entity that *is* empowered to impair such contracts: the federal government, acting through the bankruptcy court.

That federal power is exercised to impair municipal contracts in bankruptcy was likewise recognized in Justice Cardozo's dissent in Ashton v. Cameron County Improvement District No. 1, 298 U.S. 513 (1936), which dissent was joined by three of the Justices in the Bekins majority, including Chief Justice Hughes, the author of Bekins.

The Act does not authorize the states to impair through their own laws the obligation of existing contracts. Any interference by the states is remote and indirect.... If

contracts are impaired, the tie is cut or loosened through the action of the court of bankruptcy approving a plan of composition under the authority of federal law. There, and not beyond in an ascending train of antecedents, is the cause of the impairment to which the law will have regard. Impairment by the central government through laws concerning bankruptcies is not forbidden by the Constitution. Impairment is not forbidden unless effected by the states themselves. No change in obligation results from the filing of a petition by one seeking a discharge, whether a public or a private corporation invokes the jurisdiction. The court, not the petitioner, is the efficient cause of the release.

Ashton, 298 U.S. at 541-42 (Cardozo, J., dissenting) (citations omitted). This rationale would be adopted by the Bekins majority just two years later in confirming the constitutionality of chapter 9's predecessor. Accordingly, longstanding Supreme Court precedent confirms that it is the federal – and not state – government that impairs contractual obligations in chapter 9, and the Objectors' arguments to the contrary must be rejected.

III. The Pensions Clause Enjoys No Special Status in Chapter 9

The Objectors contend that the constitutional status of the Pensions Clause renders it qualitatively different than mere state statutory law and, thus, insulates it from pre-emption by the federal Bankruptcy Code. See AFSCME Supplemental Brief, at 2. The Objectors, however, offer no citation that might support their differentiation of one form of state law from another for pre-emption purposes. Indeed, as demonstrated in the City's prior briefing, far from being forbidden, the

pre-emption of state constitutional law – notably, the various state contracts clauses – is a commonplace in municipal bankruptcies. See Ass'n of Retired Emps. v. City of Stockton (In re City of Stockton), 478 B.R. 8, 16 (Bankr. E.D. Cal. 2012) ("The federal bankruptcy power also, by operation of the Supremacy Clause, trumps the similar contracts clause in the California state constitution.").

The Pensions Clause similarly establishes no special priority for claims for pension underfunding. It merely establishes that such claims are contractual obligations of the State. Accordingly, arguments that claims for underfunding require separate classification under a plan of adjustment or that such claims should be exempted from discharge (see Retirement Systems' Supplemental Brief, at 6-8), in addition to being premature and irrelevant to a determination of eligibility, should be rejected.

Finally, multiple Objectors (see, e.g., AFSCME Supplemental Brief, at 3-4) identify the Supreme Court's decision in Midlantic National Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494 (1986), as a source of protection for rights created by the Pensions Clause, which are characterized as necessary to public health and safety. The Objectors offer no citation in support of the proposition that the impairment of monetary claims implicates public health and safety, and the City's research has uncovered none. Accordingly, this argument must be rejected.

For the foregoing reasons, and those set forth in the Prior Submissions and City Pre-Trial Brief, the Court should enter an Order for Relief in this case.

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Respectfully submitted,

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